EVERYBODY'S LEGAL ADVISER

Everybody's Legal Adviser

VOLUME II

The Ownership and Use of Land and Personal Property

including Tenancy in Common; Landlord and Tenant; Licensing of Land; Rights of way; Water; Light; Use of Highways; Automobiles; Farm Law; Personal Property; Animals; Letters Patent; Copyright; Trade Mark; Kinds of Contracts and Parties to them.

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CHAPTER IV

Modes of Owning Land (*Cont'd.*)

§ 17. By Joint Tenants and Tenants in Common

1. What is a joint tenancy.
2. How created.
3. Abolished in many states.
4. What is a tenancy in common.
5. A tenant cannot convey a particular part of the estate.
6. Nor acquire a title against the others.
7. Nor maintain an action of trespass against another tenant.
8. Can recover his share of the profits.
9. How the estate may be divided.

1. A joint tenancy is defined to be the holding of land by several persons by purchase. Though the estate may be a single one outwardly, yet, between themselves each is entitled to his share of the rents and profits, so long as he lives, and, on the death of one of them the survivor or survivors take the entire estate.

2. A joint tenancy can be created only by purchase or act of the parties, and not by descent or act of the law. It must be created by one and the same act,

deed, or instrument, and have a fourfold unity. The interest must be acquired by all, by the same act, begun at the same time, and held by the same title and possession. The most objectionable characteristic of a joint tenancy is the right of survivorship, whereby the estate finally comes into the possession of a single individual. Two corporations, therefore, cannot be joint tenants.

3. This kind of ownership of land is contrary to the policy of American law, and, in many of the states, has been abolished by statute. A joint tenant cannot acquire, by adverse title, the interest of the others; nor can he sue or be sued alone. If anyone wastes the joint estate the others have an action against him. Either tenant may convey his share to a co-tenant, or even to another who thereby becomes a joint tenant. Of course, a joint tenant cannot devise his estate. Lastly, a joint tenancy may be dissolved by voluntary partition, or by a statutory one whenever the tenants themselves are not willing to divide.

4. A tenancy in common exists when two or more persons hold land by several and distinct titles. The unity between them is that of possession. Thus, one may be an absolute owner, another for life; one may have acquired his title by purchase, another by descent; one may hold a fifth, another a twentieth. Nevertheless, they are tenants in common.

Lastly, an estate conveyed to several in unequal shares, in consequence of having contributed unequally toward the purchase, belongs to them as tenants in common and not as joint tenants.

5. Although each tenant can alienate his share, he cannot convey any particular part of the estate. Nor can one of several joint owners dedicate any portion to the public. In like manner a deed of one co-tenant's share, reserving his share of the mines in the same, would be void.[1] He cannot create a right of way over the common estate.

6. As their possession is in common, no one of them can acquire a title by adverse use against the others. The possession of one tenant in common is deemed to be the possession of all. It is held to be a fraud for one tenant to suffer the common property to be sold for taxes and to purchase it for himself. Should he do so the tax-title would inure to the benefit of all. But, should the interests of the co-tenants be separately assessed, there is no rule to prevent one from buying at public sale the title and interest of another.

7. A tenant in common cannot maintain an action of trespass against another co-tenant. This can never be done unless the party charged has done something inconsistent with the rights of the other co-tenants. The act must be an eviction or destruction of the property, in order to give the tenant the right to proceed against the others. But a tenant may have an action of waste against his co-tenant either by statute or at common law. If one tenant should cut timber and sell it, the co-tenants could recover their respective shares of the proceeds.

8. A tenant may recover from his co-tenant his share of the rents and profits of the common estate.

[1] Adam v. Briggs Iron Co., 7 Cush., 36a.

Of course there can be no recovery unless the co-tenant has taken more than his proper share.

Though a tenant cannot be made to pay rent to his co-tenant for permissive sole occupation of the land, he may be held accountable for what he receives as a rental. If he ousts his co-tenant and occupies adversely to him, he is liable for the rent. In Vermont one of several co-tenants converted the common land into a race-course and cut down trees growing thereon, but was obliged to account both for the timber and for the profits of the race-course.

Independently of statute, a tenant in common cannot compel his co-tenant to contribute to the cost of improvements. But the expense to which a tenant is subjected for the preservation of the common porperty may be ratably apportioned among them all; for example, payments for necessary repairs, a mortgage, taxes, assessments, and the like.

9. A tenant in common of a bale of cotton cannot maintain an action to recover it from his co-tenant, for the possession of one of them is, in law, the possession of the other.

§ 18. By Landlord and Tenant

1. Uncertainty of a verbal lease.
2. Who is presumed to be tenant.
3. When the law requires a lease to be written.
4. Names of parties to a lease.
5. Period for which a lease runs.
6. Language of a lease.

7. Distinction between a lease and an agreement for a lease.
8. The parties must be competent:
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   b.—Guardian,
   c.—Executor and Administrator,
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9. What can be leased.
10. Lease must be accepted.
11. And recorded.
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15. How lessee may use the premises.
16. Lessee's right to assign and sublet.
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38. Who is liable in apartment houses.
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40. Effect of surrendering the lease.
41. Merger of a lessee.
42. Lessee cannot question lessor's title.
43. Letting on shares.
44. Tenancy at will described.
45. How created.
46. May be implied by law.
47. Cannot acquire title against owner.
48. Rent is not always payable.
49. Tenant's right to crops.
50. How tenancy may be ended.
51. Creation of tenancy from year to year.
52. Tenancy from month to month.
53. Notice to quit.
54. This must be distinguished from notice of summary proceedings to recover possession.
55. Effect of agreement on notice to quit.
56. Effect of selling land.

1. Leases of land are multiplying in number, though happily not in complexity. The modern law has been clarified by statute; nevertheless there are many ancient principles remaining, which it is especially desirable to understand because these diverge so far from the common understanding on which individuals, who do not know the law, too often rely. Perhaps no subject will be considered of more practical importance to a larger number than this concerning leases and the mode of using leased property.[1]

[1] For forms of lease, see Vol. VI, Appendix, No. 3.

First of all, it may be remarked that an oral, or to use a legal phrase, a "parol lease," is a very one-sided agreement in favour of the landlord. Is proof wanted? Should a man rent a building for a year which burned down within a week after taking possession, through no fault of his, nevertheless he would be required to pay the rent to the end of his tenancy, nor would the landlord be required to rebuild, but might serenely keep still and compel his tenant to pay rent, as if he were in undisturbed occupancy. In some states this common law rule has been changed by statute. Consequently, it behooves every one who rents a building, however short the time, to make a written lease embodying the entire agreement.

2. A person in possession of land who pays rent to one claiming as owner is presumed to be a tenant. But the presumption of such relationship may be overcome by showing that the payment was by mistake, or by other equally clear circumstances. In such cases by statute in many states a tenancy from year to year will be presumed. A presumption of tenancy arises when an entry and occupation are with the owner's permission. A tenancy cannot be implied, however, where an express contract or an arrangement between the parties shows that it was not intended by them to occupy the relation of landlord and tenant, for example, if there is a permission to occupy without rent, or the possession is not exclusive.[1]

3. As a lease is an agreement for the use of land, a statute requires that it shall be in writing, unless the

[1] 24 Cyc., 883.

period is very short—in many states one year. In some of them, however, the period is longer—three years, thus corresponding with the English statute. The statute prescribing this requirement is one of the most important in the entire body of the law, and is known as "the statute of frauds," first enacted in England, and afterwards re-enacted in whole, or in part, in nearly every state of the Union. A valid lease for a year may be made verbally, even though the time for taking possession is not immediate. Furthermore, if it exceed the statutory period, it is not absolutely void, but operates as a lease at will.

4. The person who leases is called the lessor; the one who is to come into possession, the lessee. The latter does not own the land, but has only a limited right to the use of it. The extent of this use or occupancy, like so many other questions in the law, cannot always be easily ascertained. In a general way, it may be said that the lessee is the possessor, and can make such use of the land or premises during his term as the lease or the law prescribes. For example, on one occasion a person hired a store, on the outer wall of which people posted advertisements, paying for the privilege. The question at once arose, could the lessee sell this privilege, or did the landlord still have the right? How fully the lessee can use the premises will be considered elsewhere.

5. A lease is for a definite period, usually called a term. A lease from the first day of July begins on the second day and lasts through the anniversary of the day from which it was granted. Very often the

term of the lease is expressed definitely—leaving no question open concerning the precise number of days for which it is to run.

A lease may be made for a time that can be definitely ascertained. Thus, a lease to A for twenty-one years, should he live so long, would be valid. So would a lease to A during his minority, as the time of attaining his majority is fixed by law. In like manner a lease for a year, with the privilege of holding for three years from a certain day, means the right to remain from year to year, not exceeding three years; and the tenant may quit at the end of any year on giving proper notice. Again, a lease for a year, and so on from year to year, is regarded as a lease for one year only, If the tenant continues for a second year without the lessor's dissent, it is a lease for that year, and so on for each subsequent year.

A lease may be created to take effect at a future date, provided the period of beginning is not so far away as to violate the law concerning the creation of future estates. In our modern American jurisprudence this question is rare; under the English system, whence this rule is derived, the legality of leases that are to begin in the future has caused much legal controversy.

In Massachusetts a term for one hundred years or more is deemed a fee or absolute estate, so long as fifty years remain unexpired. In Ohio lands perpetually leased (or renewable forever), though in one sense they are leased, in another sense, are absolute property, and may be taken for the debts of the lessee.

In Connecticut lands that were free from taxation because they were devoted to religious uses were leased for the period of ninety-nine years to escape taxation; and the purchaser, supposing this method of evasion would be successful, paid a much higher price for them. The state pounced on the new owner, declared that the lease was simply an evasion to escape taxation, and that for taxation, at least, the land must be regarded as an absolute estate. Through a costly law-suit, therefore, did the buyer purchase his wisdom, like many others before and since his day.

If the duration of the term is not definitely expressed in the lease, resort may be had to other sources to find an answer. A lease for a year is not converted into a tenancy from month to month by the fact that receipts for rent paid state that the letting is for one month only. When a lease is to run for one or more years "from" a certain day, the corresponding day in the year in which the lease terminates is to be excluded in compiling the duration of the term unless there be a contrary custom. A lease "to" a certain day ends with the expiration of that day. And leases of doubtful duration must be construed favourably to the tenants. Thus if there be a doubt on which of two days a lease is to terminate, the lessee may make the election. A tenant in undisturbed possession of the leased premises cannot deny the title of his landlord.

By statute in New York agreements which do not specify the duration of occupation, extend to the first day of May next after possession is taken. Obvious

mistakes of the parties in computing the term or specifying the day of termination are judicially disregarded. A lease for a fixed term which gives the lessor or the lessee an option to continue the tenancy for an additional term terminates with the expiration of the term first mentioned unless the option is exercised. Either party may be given the option of terminating the lease on notice. The term continues in such a case until the option is exercised by giving notice of an intention to terminate the lease.[1]

6. Any language will suffice showing the intention of the parties. The words generally used to indicate this are: "grant," "demise," and "to farm let." They have a technical and extended meaning, and imply that the term of a lease is to begin presently, and not at a future date, or on a contingency. Neither of them is indispensable to constitute a valid lease. A lease should describe clearly the premises that are to be leased, for a defective description cannot be cured by outside or additional evidence.

The lease of a building is a lease of the land on which the building stands. Whether a particular place is a part of the leased premises depends partly on the question of boundary, but more especially on the question of intention. But a reservation in the lease must be so construed as to enable the lessee to conduct the business for which he leased the premises. With the lease of a part of the building there passes as an incident everything reasonably necessary to its enjoyment. Thus if a building consist of several apart-

[1] 24 Cyc., 961.

ments so constructed that all occupants must enter and depart by the same hall and stairway, these become a way of necessity on the lease of the apartments.

"A memorandum expressing the consent of the owner that another shall have immediate possession of premises, and shall continue to occupy them at a specified rent and for a definite term, is a sufficient lease. In general, any agreement under which one person obtains the right of enjoyment to property of another, with his consent, and in subordination to his right, may create the relation of landlord and tenant. As between parties, an agreement may be a lease, while as to third parties it may be construed as a building contract. Where an instrument has the effect of giving a holder an exclusive right of occupation of the land, although subject to certain reservation, or to a restriction of the purpose for which it may be used, it is in law a lease of the land itself." [1]

7. Sometimes a lease is made, or at other times an agreement for a lease, and the parties themselves have not always known which thing they intended to do. To the reader this question may seem to be very near the edge of the absurd, but as the language used in a lease, or in an agreement for a future lease, is often nearly the same, the difficulty, in truth, does arise. It can hardly appear in agreements that are to go into immediate operation, but only in those that are to be operative at a future time. The question is important because, if the agreement is a lease, then

[1] 24 Cyc., 901.

it cannot be varied or contradicted by other evidence, any more than any other completed contract or agreement. On the other hand, if the agreement be simply *for* a lease, then, from its very nature, it is incomplete and is open for revision.

The test, whether the agreement is a lease, or only an agreement for a lease, is its completeness.[1] If nothing is left incomplete then the agreement is a lease; otherwise it is stamped with the other character. Thus, an agreement to let land to a company to place sand thereon, for a given period, was held to be an actual letting, and binding the parties thereto. In another case A wrote to B that he would take his house at a specified rent for two years if he would put a furnace therein, and B replied that he would accept the offer, and at once put a furnace into the house before the date was fixed for the term to begin. This was held to be a lease, and not a mere offer for one. One more illustration: A proposed to B, in writing, to hire a shop of a specified size at a fixed rent on a piece of designated land, if he would erect the building. B accepted the offer and built the shop, and A took possession. B did not own the land and did not complete the shop within the time stipulated. Nevertheless by accepting the offer and occupying the shop, the agreement became effective. It may be added that the lessor's failure to complete the building by the time fixed in the agreement would have released the lessee, had he wished, from his obligation.

8. To make a valid lease of course the parties must

[1] 1 Washburn, § 621, p. 361.

be legally competent. If one of them is non compos mentis the lease is void unless it has been executed.

(*a*) Leases made by a minor are not void, but may be avoided. To have this effect some positive act on his part is required. A lease may be disaffirmed or avoided by a minor before he attains his majority, though the rule on this subject is not uniform in all states.

(*b*) A guardian may lease his minor's land during the period of his minority. Were the lease made for a longer period the ward could, if he pleased, after attaining his majority, have it set aside for the excess. A lease made by a guardian may be set aside or defeated by a new guardian. This principle is recognised in several states. The same rule applies to guardians of insane persons. A lease terminates on the death of a ward, whatever may have been the terms. Whether it would bind the lessee for the original term, if the heirs of the ward should choose to affirm the lease, is an unsettled question. A parent has not the same right as a guardian to lease or deal with the land of his minor child.

(*c*) Executors and administrators, who have a lease coming to them as a part of the possessions belonging to the deceased, may dispose of the whole or carve out smaller estates or interests by underletting. If there be two or more executors, a lease or transfer of the term by one of them, if purporting to be of the entire interest, will pass the same.

(*d*) Trustees who have a legal ownership of lands may please them to any extent, as this is a right inci-

dent to their ownership of them. Corporations also can lease their lands either with or without a seal.

(*e*) A single member of a partnership cannot make a valid lease of partnership land. On one occasion a partner leased his estate to the partnership, which was afterward dissolved by the death of a member. This event terminated the lease. A different rule would have applied had the lease been from a third person.

9. Passing from persons to property, we may inquire what can be leased. Besides land, various interests therein may be leased; for example, the right of wharfage, the right of flowing another's land with water, rights of way, and the like. But a widow cannot lease her right of dower before it has been set out to her.

While a single room or an entire floor may be let for lodgings and in a way to become a separate tenement of the lessee, an ordinary agreement for board and lodging in a house by which the keeper retains the legal possession and care of the whole house does not create the relationship of landlord and tenant.[1]

10. Of course, a lease cannot be effective unless it has been accepted, which is often presumed. This question can hardly arise about a lease that is to go into immediate execution, but it may in regard to a renewal. Thus, a tenant had a lease for three years, with a right to hold for two years on the payment

[1] 24 Cyc., 879.

of a larger rent. Having paid the larger rent for one or two quarters of the second period, it was held that both parties were bound for the extended period.

A lease takes effect only from its delivery and not from its date, and there can be no delivery without an express or implied acceptance. While delivery implies a manual transfer of possession from one person to another, yet if the lessee acts by formal consent, or unequivocal acts as by entering into possession, this is a sufficient delivery. The delivery is complete when the lessor has gone beyond his ability to rescind or to recall the agreement.[1]

11. A lease, like any other conveyance of real estate, must be recorded in order to bind subsequent purchasers or creditors. Not all leases though, only those that are to run for a period usually of five years or longer. This period, says Washburn,[2] in Massachusetts is seven years, in Kentucky five, New Hampshire seven, Delaware twenty-five years, if for a fair rent accompanied by possession; in Maine seven years, in Michigan the same, in Ohio and New York three, in Rhode Island one, and in North Carolina all leases required to be in writing must be recorded.

12. A lease made for an unlawful purpose is void. For example, the lease of premises for the manufacture and sale of spirituous liquors, in a state where the business is condemned by law, would be invalid. But the mere knowledge on the part of the lessor that the premises are intended to be used for an illegal pur-

[1] 24 Cyc., 905.
[2] 1 Washburn, § 639, p. 372. In Louisiana all leases must be recorded.

pose, unless he participates in the design, will not render the lease invalid.[1]

Occupation of the premises by the lessee and payment of rent in accordance with the terms of the lease is usually held to be a ratification by him of an invalid lease. Likewise acquiescence in the occupancy of the premises by the lessee and acceptance of rent from him will, as a rule, amount to a ratification of a void lease, but some new promise or condition is necessary. Nor will mere acceptance of rent, without any other act of confirmation, always operate as a ratification of a defective or void lease on the part of the lessor.

13. (*a*) A lease usually contains both express and implied covenants. By an implied covenant is meant one created by law without any special words or language. The first that may be mentioned is a covenant or agreement for quiet enjoyment. The law assumes that the lessor, at the time of leasing his premises, is the legal owner and possessor; if the fact be otherwise he must make good to the tenant all damages accruing to him from the loss of possession.

(*b*) There is also an implied covenant against waste. The lessee assumes an implied obligation to use the premises in a proper manner and to keep the buildings in repair, and, failing so to do, he is liable, in an action called waste, for the damages sustained by the lessor. If there be no express agreement concerning repairs, the lessor is not bound to make any; but, if he undertakes or agrees to make them, he is bound

[1] Nor can the lessor plead the immorality of her calling as a defence against rent. Lyman v. Townsend, 24 La. Ann., 625.

by an implied covenant to do this in a workmanlike manner, without injuring the lessee. The courts tend strongly to minimise all implied covenants or agreements, thus rendering the written lease the entire agreement between the parties. Such a change in the legal attitude toward the parties is more in harmony with the spirit of the age and with the principles of justice.

(*c*) Another distinction concerning these covenants must be noted. Some of the covenants are personal and bind only those who made them; others run with the land and bind other persons beside their makers. Implied covenants are always personal; express covenants may run with the land, or may not.

(*d*) In general, a covenant that is beneficial only to the owner of the land, and that relates to its preservation or improvement, runs with the land. The most important covenants possessing this peculiar transmissible character are those for quiet enjoyment, to pay rent, insure, repair, deliver the estate in good condition, to reside on the premises, and to pay the taxes. Other covenants of this nature are those by a mill-owner not to let any other place or site for a mill of the same kind; or by a lessee not to sell any wood or timber, or to cultivate the land in a particular manner, or to raise only certain crops, or only on alternate years. These are good illustrations of covenants that run with the land, binding both parties to the lease for their performance.

(*e*) Covenants may run with a part of the land, and not with the entire portion.

(*f*) Who are or who may be affected by the covenants that run with the land? An assignee or a lessee would be bound, but not a sublessee, and as he is not, of course his assignee would not be. On the other hand, the assignee of the lessor is bound.

An agreement to keep a house in repair runs with the land and binds the assignee, though he is not named. But a covenant to build a new house will not bind an assignee unless he is named, though, as another has remarked, "The good sense of this is not very easily discoverable." Yet, as we noted when setting out on our legal travels, there are many things in the law which do not square with sense; hence the need of legal knowledge to escape the pitfalls.

14. Often blank forms are used in making leases, and sometimes the printed and written agreements or clauses are inconsistent with each other. When they are, the written clauses are regarded as containing the true statements and intentions of the parties, and the printed ones, so far as they are inconsistent, must give way to the other.

15. A lessee is bound by an implied covenant to use the premises in a proper and husbandlike manner. What such husbandry may be depends largely on the place where the land is situated. Different rules, obviously, exist in different places. The tenant is bound to keep the soil in a proper state of cultivation, to preserve the timber, to support and repair the buildings; neglect of his duty in these matters will render him liable in an action for waste. Of course, the implied covenant or agreement may be modified or set

aside by an express agreement. In one case a lease of a farm was dated July 18th, before the grass growing thereon was cut. The lease was for five years, and in the fifth year the tenant cut the grass on the tenth of July, thus taking six crops of grass from the farm during his term of five years. This was held to be a violation of the rules of good husbandry. In Illinois it is the duty of the tenant to pay all the taxes during his tenancy; failing to do this followed by its public sale and becoming the purchaser, he cannot hold the land against the owner of the inheritance. Where a lessee guarantees to pay the taxes assessed on the leased premises and fails to do so, the lessor can recover the amount assessed, although he himself may not have paid them. Furthermore, were the premises destroyed after the day of levying the tax and before the time of payment had expired, the entire tax would be recoverable under the lessee's covenant.

In a lease of real property containing machinery and other fixtures, questions often arise concerning its use, and the intention of the parties to the lease. A factory with its machinery which is leased carries the right to the use of the water-power for the operation of the mill. But the lease of a store or warehouse does not imply that the building is safe or well built, or that it is fit for any particular use. And the lease of a salt-well would be no assurance or measure of its capacity.

When the lease is silent concerning the use of the premises by the lessee, he has the right to use them

as he pleases, not materially different from that in which they are usually employed, or to which they are adapted. But the lessee must use the property in a proper and tenantlike manner, without exposing the buildings to ruin or committing any waste. A tenant of farming land under a lease which does not restrict the use he is to make of the land has a right to pasture cattle thereon, and to make any other reasonable and usual use of the land he may see fit. By such a lease the law implies that it shall be used for that purpose, that no waste shall be committed and that it shall be farmed in a husbandlike manner.

Manure in the ordinary course of husbandry is the property of the lessor and belongs to the farm as an incident necessary for its improvement and the tenant has no right to sell it or apply it to any other use. Manure made in livery stables, or in buildings unconnected with agricultural property, belongs to the tenant.[1]

16. In many states, unless there is some restriction in the lease, a tenant may assign the lease or sublet the premises. Furthermore, an assignment of a lease that must be in writing to satisfy the statute of frauds must also be written.[2]

17. A lease may be so drawn that neither party can assign nor transfer it. To be non-assignable the terms must be very explicit; otherwise, on the death of the lessee, his executors or administrators can assign the term. In like manner a lease may be assigned by the process of insolvency. By such an assignment the

[1] 24 Cyc., 1066.
[2] Form of assignment, see Vol. VI. Appendix, No. 5.

estate passes, discharged of all covenants or agreements not to assign, if the proceedings are bona fide. Again, the retirement of a member of a partnership, and the taking of his place by another, are not a breach of the covenants or agreements not to assign the lease.

18. A transfer by a lessee of the whole or of a part of the estate, for a part of the time, is a sublease and not an assignment. In such a case the original lessor has no right of action against the sublessee, for he is liable only to his lessor. But a transfer of the whole or a part of the leased premises by the original lessee for the residue of the term is an assignment. In such a case the tenant having underlet a part of the premises for a part of the time, and then assigned to a third person all his interest in the original lease, his assignee could recover the rent from the one to whom his assignor had rented a portion of the premises.

Whether a lessee, in parting with his interest in his lease, assigns or underlets, depends on the question whether he has parted with his entire interest. If he has then it is an assignment. If the period is to expire before the expiration of the original lease, then it is a subletting. The retaining of the smallest interest has the effect of creating simply an underlease. In the case of a lessee who leased to another the premises for the residue of his term, reserving the right to recover possession on the last day, there was an underletting and not an assignment. In another case, that of a lessee who transferred his entire interest, reserving a rent larger than that specified in

the original lease, with the right of entry in case of non-payment, there was an underlease and not an assignment. In short, a lessee who reserves to himself the right of entry for any period, however short, or under any condition in the event of the non-payment of the lease, simply underleases his term.

19. A tenant at will[1] has no estate he can assign to another whereby a relationship can be established between the original lessor and such a tenant.

20. The respective rights between the original lessor and the tenant of a lessee or sublessee are well settled. The lessor cannot sue the undertenant nor recover rent of him in any form of action.

21. Should a lessor sue a sublessee in possession of leased lands to recover rent, the latter will be presumed to be the assignee of the lessee until the contrary appears. A surrender by the lessee to the lessor which is accepted by him during the occupancy of another is conclusive evidence that the lessee, and not the occupant, holds the premises under the lessor.

22. As the lessee may assign or underlet his interest, unless he is forbidden to do so by agreement, in like manner the lessor can convey or assign his reversion in the land after the expiration of the tenancy, or interest, and thereby bring in a new party. In order to give effect to this transfer by the lessor, it is not necessary that the tenant should attorn to or acknowledge such grantee or assignee to render the transfer valid.

As a general rule, the transfer of a reversion carries

[1] One whose tenancy ceases at the will or order of the lessor or landlord.

with it the rent already due and accruing therefor. It is of little consequence how one becomes a reversioner as affecting his right to recover rent of the tenant or his assignee whenever it falls due.

If only a part of the reversion is conveyed the grantee or assignee may recover his share of the rent, pro rata, which is determined by the relative values of the respective portions of the reversion. This principle concerning the apportionment of rent between several assignees applies to a reversion that has descended to several heirs. When this event happens one of them can sue for his part accruing after the death of his ancestor without considering the rights or interests of the others.

23. The rent and reversion may be separated by the lessor or owner. He may convey his entire estate, yet reserve the rent to himself. Or, again, he may assign the rent without granting the reversion, and the assignee may recover the subsequent accruing rent in his own name in an action of debt. The rent, however, cannot be apportioned by the landlord to different persons without the tenant's consent. Again, a lessor may give or devise a part of a rent which will be good without the tenant's consent, and the devise may be severed from the reversion.

When by an assignment of a reversion the rent passes, or vice versa, the assignee may sue in his own name for any rent accruing after making the assignment.

The assignee of a reversion of the land, or of the rent, should give notice of such action to the lessee

or the tenant, otherwise he is protected in paying the rent to the lessor on his demand therefor. But no act done by the assignor, after the notice of such an assignment has been given to the other party, will be of any avail to him.

The assignee of a lessee who holds under a recorded lease containing a mortgage on the premises is bound to take notice of it.

24. There is a distinction between a special assignment of a lease by a lessee, and an assignment by legal process or by operation of law. In the former case the parties to the assignment are supposed to understand the terms and to assent to them. But no such result follows the assignment of a lease by the bankruptcy of the lessee, for the reason that the parties into whose hands it may come have not previously given their assent. Hence, in the latter class of cases, the assignee has a reasonable time to ascertain whether the lease can be made available for the benefit of creditors before he is required to make his election whether to accept the assignment or not. If the assignee accepts he can never deny the validity of the assignment in an action by the lessor for rent, nor can he escape liability for abandoning the premises before the lease has expired. An assignment of the lease does not change the lessee's liability under the express covenants or agreements contained therein.

25. The lease of a private residence is not a warranty that it is reasonably fit for habitation. Nor can a lessee, unless the lessor has misrepresented the healthfulness of a place, abandon it on the discov-

ery that it is unhealthful and escape paying rent. The law does presume that a furnished rented house is not infested with bugs. A learned law writer remarks that the law on this subject seems doubtful, and is confined strictly to furnished houses. We cannot help thinking that the same legal presumption concerning the presence of these animals should not apply alike to all furnished houses, to one in the foulest part of New York as well as to one on Murray Hill. Something besides location, the kind of people usually inhabitating a house, ought to enter into the proper determination of the question.

As a person who wishes to hire a house or other building can usually inspect it before making a lease therefor, the owner is under no implied duty that it shall be fit for the use intended by the lessee. In harmony with this rule, the mere omission to disclose a known defect is not a fraud; even the omission to declare a nuisance dangerous to health or life is not the landlord's duty. But, on one occasion, the lessor was declared liable for an injury arising from an undisclosed defect in the floor.

26. Unless the lessor expressly agrees to make repairs he cannot be held for them. In some states, however, he is bound to keep the leased premises in ordinary repair. He is not bound to repair defects in a building known to the tenant when he leased the premises. In several states by statute the lessor of a leased building, intended for the occupation of human beings, must put it in a condition fit for habitation and make repairs that are afterward required.

The statutes are limited in their application to property used for dwelling-house purposes and do not apply to business properly. And in some states the tenant is not liable for repairs arising from accident not caused by the tenant.

No agreement is implied that the lessor will make repairs. But when hallways, staircases, elevators, etc., are used in common by other tenants of a building and are under the control of the landlord, he must make the necessary repairs. In some states he is not liable for injuries to a tenant caused by defects in halls or stairways used in common by several tenants when the defects occur after the beginning of the term and the landlord is guilty of no active wrong or negligence. The lessor of a building let out in stories, each being in the exclusive possession of the lessee, is not liable to the lessee on one floor for damages caused by imperfections in another floor without the lessor's fault.

Likewise the lessor of an entire tenement is not liable for injuries to the lessee or to a subtenant through defects in a hallway used in common by all the tenants since he is not legally in possession of it and is not obliged to make repairs.

An agreement to keep the premises in repair is generally construed to mean to keep them in as good repair as at the beginning of the lease, but not to make repairs in the way of substantial and permanent changes. By the common law rule, which has been followed generally in this country, an agreement on the part of the lessee to keep in good repair

imposes on him an obligation to rebuild the leased premises if they are destroyed during the term by fire or other casualty, even when he is without fault. Now, however, in some states by statute or judicial construction, no agreement or promise by a lessee to keep and leave the leased premises in good repair requires him to rebuild should the premises be destroyed by fire or other casualty without fault or negligence on the tenant's part unless the language of the lease shows plainly that it was the intention of the parties that he should be so bound.

The lessor of a water power impliedly agrees to keep in repair the canal that conveys the water, or the supply of water unfailing. But the grant of a right to take water from a well does not bind the owner to keep it in repair.

27. Should the premises be destroyed neither lessor nor lessee is bound to rebuild or repair, unless there is an express agreement in the lease to that effect. But if the lessee agrees to repair and restore the premises, and surrender them in good condition, he must abide by his covenant. It is said that even the impossibility of performance by the act of a third person, or by the act of God, affords no excuse for its non-performance. It is the party's folly that led him to make such a bargain without providing against the possible contingency.

28. The lessee is not absolved from paying rent through the lessor's failure to make repairs, even though he has agreed to do so; nor will this justify the lessee's abandoning the premises. His proper remedy

is an action against the lessor on his agreement. In this he can recover such damages as he may prove to have sustained in consequence of the lessor's failure to keep his agreement.

29. Even though a building is destroyed by fire and the lessee is free from fault, he is bound to pay the rent, whatever may be the condition of the premises, unless relieved by agreement or statute. In applying this principle a farmer, who sought to have his rent abated in consequence of the destruction of an important bridge, failed in his contention. Nor would an oral stipulation not to exact rent should a building burn down be of any avail, for this would contradict the written agreement, which the court will not permit. And if by specific agreement the payment of rent is to be partly or wholly suspended after the destruction in part or wholly of the premises by fire or other accident, this does not mean their gradual decay, and in such a case the lessee must continue to pay rent as before.

From this hardship the tenant has been relieved in many states by statute. This generally provides that the tenant of a building that has become untenantable by fire or gale, without his fault, is not bound to repair, and may, if he pleases, surrender and abandon it.

30. A tenant has no right to make material or permanent alterations in the leased premises, and since the lessor has the right to restrict the use and enjoyment of his property when by express stipulation the lessee is prohibited from making any alteration without the consent of the lessor, the latter may recover

damages sustained by him for alterations in the premises without his consent and to an injunction to prevent the lessor from making other alterations.[1]

31. Unless the rent is payable in advance, or a time is subsequently fixed in a lease, it is not due until the end of the year; if payable quarterly, it is not due until the end of the quarter. When payable at a particular date, it cannot be apportioned with respect to a part of the time on such a date.

32. An agreement to pay rent is not affected by a lessor's agreement concerning insurance. Should the lessor insure his property and the building be burned, the tenant has no right in equity to have the money applied to rebuild the premises, nor to restrain the lessor from suing for rent until the structure is restored. But, if the money is to be applied by agreement to repair or rebuild, then it is like other covenants which run with the land, and the lessee is entitled to the benefit of it.

33. When a lease provides that the tenant may at his option have an extension for a specified time after the expiration of the term, his holding over after the time has expired is an election for the extended term.

A renewed lease is a new lease which operates as a surrender of the old one. But a renewed lease may be considered as a continuance of the original lease for the protection of legal interests which, once created, the law will not permit to be destroyed. But when a lease is renewed under a contract expressly providing

[1] 24 Cyc., 1094.

that the tenant shall hold under the original lease, and subject to its conditions and privileges, it will be regarded as a continuance of the original lease and the rights and privileges of the parties are to be determined by the terms.

34. When by the terms of the lease the lessor has the option to renew the lease, or pay for the lessee's improvements, the latter can make no claim for their value after the lessor has exercised his option and renewed the lease.

When the option to purchase is duly exercised by making the election, the relation of landlord and tenant ceases and that of vendor and purchaser is created, the lessor is no longer entitled to rent, and the lessee continues to occupy as owner.

35. (*a*) A lessee who is evicted or turned out of the premises by the lessor, or by a person having a still better title, is discharged from paying rent after such unwelcome treatment. But there can be no eviction until the tenancy has actually begun.

(*b*) Any act done by the landlord, or by his direction, which lessens the value of the premises to the tenant, he may treat as an eviction. A landlord who entered and partly destroyed a summer house thereby evicted his tenant. In one case a lessor let some strenuous pigs into grounds rented for exhibition purposes, which rooted it up, rendering it unfit for use; this was an eviction.

To darken the windows of leased premises by erecting a new building is not an eviction, but if the tenant's premises are thereby rendered unfit for use,

he is clearly justified in abandoning them. A curious illustration is given—the case of a distillery that was leased to a tenant, and his landlord prevented him from getting a license to run it. It was useless. In another case a landlord failed to furnish heat as he agreed to do; as the premises could not be inhabited, the tenant was justified in fleeing from them.

More generally any act by the landlord or by his direction, though not directly interfering with the enjoyment of the premises, but rendering their occupation incompatible with health and comfort, the tenant may treat as an eviction. Thus, to establish a smallpox hospital next to his grounds leased by a tenant, or to deposit gunpowder or create some offensive institution, saloon, or the like, that would render life unendurable to his tenant, would be an eviction. Of course, whether the particular act possesses this character or not is purely an inquiry of fact to be determined in the usual manner.

(*c*) A lessor who enters and evicts the tenant wrongfully from a part of the premises suspends by his conduct the entire rent until possession is restored. An actual ouster from a part may be treated as an eviction from the whole.

(*d*) The eviction must be done by the lessor or by his order, or by a person having a title paramount to the lessor's. An act done by a stranger, as the law calls him, by which is meant a wrong-doer as distinguished from one who asserts a paramount title, will not justify an abandonment by the lessee. Thus

the erection, by an adjacent owner, of a wall that darkens the windows of the leased premises will not justify the tenant in putting on his hat, walking out, and declining to pay further rent.

(*e*) After a tenant's eviction from a part of the premises by one who possesses a paramount title, the rent will be apportioned and must be paid for the remaining part. If the eviction is by the lessor himself the tenant may elect whether to abandon the premises entirely and put an end to his tenancy and rent altogether, or to retain such part as remains, free from liability to pay any rent, so long as the eviction continues.

Suppose a person is evicted by the state in the exercise of eminent domain. Must he continue to pay rent? In Missouri the rent ceases; or, if evicted in part, he must pay rent in such proportion as the premises still occupied bear to the entire property leased. In some states he must pay rent to his landlord as before, and, having done so, can demand of the public compensation for the loss sustained through its action.

36. On the expiration of a lease some very nice questions often arise between the tenant and his landlord concerning the removal of many things called fixtures, which he may have attached to the premises during his occupancy. There is no occasion for difficulty in drawing the line between furniture and fixtures because the former is clearly separated from the building and can be removed without the slightest injury thereto; but fixtures are something attached

to the premises, although some of them may be used as furniture.

(*a*) Different rules apply to persons in different relations. Thus, in the sale of a piece of land with a house thereon, the law favours the purchaser; as between these parties the law regards as fixtures many things, which are not thus regarded as between a landlord and tenant.

(*b*) The principal rule to determine what is a fixture in every case is that of intention; but this rule is, at best, an uncertain guide. Unhappily, after many years of judicial inquiry, varying decisions are still rendered. As a general rule, whatever a tenant affixes to the premises during his occupancy may be removed, if this can be done without material injury to them. Furthermore, a conveyance by the landlord will not interfere with the tenants' right of removal during his tenancy. But, if he has not been active and complied with the rules of law in removing his own while he was in possession as tenant, his right of removal is gone.

(*c*) For the purpose of establishing a more practical rule concerning their removal, fixtures have sometimes been classified into trade and agricultural. This classification, however, has not proved helpful. The mode of annexation is another criterion. In England this doctrine plays a prominent part in ascertaining whether the thing annexed to the land is a fixture or not. At least three kinds of cases may be readily imagined for the application of this principle. First, the tenant of a mill may be hiring for a long period,

and the structure itself may be built in a very enduring manner. An office is needed, and he may construct one in harmony with the architecture of the other buildings, possessing an appearance of permanency in style, kind of material, etc. Should he do this a court would not be long in deciding that the structure was annexed with a view to permanency, and therefore as a part of real estate. Again, an office may be erected either on blocks or in parts that can be readily removed. A court would just as quickly decide that the form of structure indicated clearly enough the intention of the tenant to remove it at the end of his tenancy. The third example may be given—that of a structure erected very cheaply, and not in harmony with the other buildings. A court would just as quickly decide that the tenant had no thought of removal, but simply intended to leave it there on his departure, as a thing not worth further notice. From these examples it is evident that the mode of annexation, which plays such a prominent part in the English law, does not afford a luminous rule for the determination of the question. In some cases it will yield a satisfactory answer; in others none whatever.

(*d*) For fixtures unlawfully removed by the tenant the owner of the land may maintain an action against him to recover the value of them, which is technically called an action of trover, or he can maintain an action to recover the things themselves, such being known as an action of replevin.

Sometimes the question arises in purchasing fix-

tures with real estate—honestly supposing that both were included, though, in truth, the fixtures were not —whether the real owner can recover them. If, for example, a thing is hired by a tenant and annexed to the land, which is afterward sold to a bona fide purchaser, can the real owner recover the thing itself? Doubtless, he would have a good claim against the vendor or seller for the value of the things, but some courts have declined to give him any other remedy. In all cases in which persons have notice of the ownership of fixtures, they cannot be bona fide purchasers of the same. It may be added that, in conveying land, an oral exception of the fixtures is invalid, because such a reservation is a contradiction of the written deed, and no principle of law is better understood than that the form of a writing cannot be contradicted by oral evidence.

(*e*) Lastly, the silence of a lessee who erects a building on his land, and, at the expiration of his term, takes a new lease of the premises and says nothing about the building, is regarded as an abandonment of his right to removal. It therefore becomes a part of the land itself, as the new lease carries the building with its fixtures; and the lessee, by accepting it, adopts this construction. Nor will equity interpose in favour of a tenant, however expensive may have been his improvements, who has not removed them during his tenancy, unless he has been prevented from removing them by injunction. In such a case he is entitled to a reasonable time to remove them after its dissolution.

(*f*) A different construction is put on a lease that terminates by the landlord's forfeiture. It is said that the tenant's right to remove fixtures is gone, whether this occurs by the ending of the lease or by an entry for forfeiture. Thus, a tenant who held over after the expiration of his term could not remove fixtures after his landlord had actually entered on the premises. The tenant's right to remove them is incidentally determined by the landlord's re-entry. This is the clearly settled rule; but a tenant holding for an uncertain term has a reasonable time to remove them after the close of his tenancy. In one of the cases, wherein a lessee was holding for an indefinite period, he erected an ice-house and filled it with ice. Doubtless, the lessor was watching him, for soon afterward he terminated the lease. Nevertheless, the tenant was permitted to sell the ice as soon as he could, which took nearly two months, and then to remove the house. In other words, he was given a reasonable length of time to secure his property. Again, an agreement with the lessor whereby the lessee has the right to remove fixtures at the expirations of his term, implies within a reasonable time afterward. And a tenant who has been wrongfully restrained from removing his fixtures will also be allowed a reasonable time to remove them after the restriction has been removed.

On the other hand, a tenant for an uncertain term who terminates the tenancy himself before removing his fixtures loses his right to retain them.

37. For an injury sustained by a third party by a

defect in the premises of a tenant, the law presumes that the tenant, and not the landlord, is responsible. But this is only a presumption, which may be set aside by fact. The liability to a third party depends usually on the question whether the tenant has the entire control of the structure which caused the injury, or is only one of several tenants. For example, one who is travelling along the street, and is injured by ice or snow falling from an awning, may recover from the tenant who has the sole control of the building. If the owner has a general control, or of the roof, or occupies a portion, he will be liable, instead of the tenant, to the injured person. For an injury resulting from the erection of the building itself, or from a defect in its construction, the landlord is responsible. Again, if the leased premises are, at the time of leaseing, a nuisance, the landlord is liable for creating it, though the tenant may also be liable for continuing the nuisance. These principles, however, have been changed in many states by statute.

Other principles of similar nature may be mentioned. When a person leases land bounded by a street, which the tenant agrees to keep in repair, and a passer is injured—by defective grading, for example—the tenant alone is liable, even though neither he nor the landlord knew of the defect. But neither is liable for defects in a highway caused solely by the wrongful act of another; the public alone is responsible. Again, a passer who is endangered by an excavation made by a builder and after-

ward continued by a tenant, may recover from either. Lastly, one who dedicates to the public across his land a way which is accepted, though unsafe, is not responsible to a person who is injured in using it.

A tenant or owner of land is not responsible to another who is injured by an act done without his agency or permission. For example, neither tenant nor owner could be held for the obstructive act of a third person to a watercourse, causing injury to a mill-owner below.

38. What rule applies to tenants in apartment houses? A tenant who is injured from the defective condition of a part of a house not included within his own lease, but which he can use in common with the other tenants, has no redress against his landlord. On the other hand, a landlord who has entire control of the defective part of the house is liable to his tenant for any injury derived therefrom.

A lessee, unless restrained by the terms of a lease, may use the premises for any lawful purpose he may choose, though this may be different from the purpose intended, if not essentially affecting or in any way injuring the premises. In one case a person hired a house for a hotel, making no agreement concerning the mode of its occupancy, and converted it into a seminary. The lessor had no ground for complaining. On the other hand, if the mode of occupancy is fixed by a lease, the tenant may be enjoined from using the premises otherwise; indeed, a misuser may have the effect of working a forfeiture of the lease. The lessor may expel him, as a landlord did whose

tenant used for an auction room a shop that was rented to him for the dry goods shopping business. Often though no special damage results from a changed use of the premises, the lessor's right to eject the lessee is unquestioned.

39. Everywhere courts are strict in not declaring a lease forfeited. In other words, every effort in harmony with justice will be made to preserve it. Thus, a lease contained a covenant not to assign or underlet; also a condition, that, if the lessee failed to pay rent or committed waste, the lessor might enter and expel him. An assignment by the lessee was held to be a mere breach of the agreement, and nothing more.

Before a lessor can avail himself of his right to enter into possession and terminate the lease because of the lessee's failure to observe all the agreements or covenants therein, he must do several things. First, if the reason for entering be that the lessee has not paid his rent as promised, there must be a demand when it is due and payable. In like manner, if a lessee is to pay the taxes, the lessor before entering to enforce a forfeiture for neglect on the part of the lessee to pay them, must demand their payment. Again, this must be done at a convenient time before sunset. Lastly, the demand must be made at the most notorious place on the land—the front door of the dwelling-house—unless some other place has been fixed by agreement.

A lessee may avoid forfeiture by tendering the rent due at any time before midnight sufficient to count

the money; and, if no place is fixed for making the payment, the tenant may save a forfeiture by going on the premises at the proper time and actually tendering it there.

In order to save a forfeiture for non-payment of rent, if the lessor brings his action of ejectment and the lessee brings the money due the lessor into court, it will stay the proceedings, provided the failure to pay was by accident and not wilfully done. An illustration may be given to show the extent to which courts will aid parties who are not in fault in this regard. A lease provided for the payment of rent in Russia Sables Iron, for which the lessor had accepted money, for forty years, without objection. At the end of that time the lessor was overtaken by some freak and demanded the iron, but there was none in the market and importations had long before ceased. The court, on the application of the lessee, gave him time to send to Russia for the iron before enforcing the forfeiture.

40. To yield up a tenant's estate for life or years to the lessor is called a surrender, and has the effect of extinguishing all claim for rent that is not due. To do this requires a deed or note in writing in order to satisfy the statute of frauds. Nor would this effect be changed by an oral agreement at the time of making the lease that the lessee might surrender it at any time he chose. Of course, a lease that does not exceed the term for which a parol lease can be made may be surrendered orally.

Again, the lessor and lessee cannot, by the formal

surrender of a lease, affect the rights of a third party; for example, those of the lessee's subtenants.

41. The effect of taking a new lease before the expiration of the old one is to work a surrender of the first, unless both leases can stand. In one case, in which the first lease was to two lessees, and the lease back again was from one lessee only, this did not operate as a surrender. Again, when a lease is by one lessor to several lessees, one of these cannot affect the rights of his co-lessees by releasing or conveying to his lessor.

An oral lease may be substituted for an existing lease, even though this be under seal, if the substituted lease is binding by the statute of frauds, and is perfected by the lessee's possession. In such a case the new lease would work a surrender of the old one.

Sometimes a lease comes to an end by a merger. This happens when a term for years and the following estate, or immediate reversion, meet in the same person in his own right, endowing him with full power of sale or alienation. This not infrequently happens, and by such a union of both estates, the lease comes to an end. But estates that are held in different ways will not merge.

42. A lessee, in an action brought to recover possession of the premises, is not entitled to question his lessor's title, nor the rent he has promised to pay in an action for the use and occupation of land. The policy of the law will not permit a tenant to be guilty of denying the title of the premises whereon he has been living. Thus, a lessee whose duty was to pay

the taxes neglected to pay them. The land was sold at public sale and purchased by the lessee, but he was not permitted to set up his title against his landlord. The rule would have been otherwise had he not been required to pay the taxes. Furthermore, he has no right to complain of a want of title in his lessor so long as he is in undisturbed possession.

The importance of this rule is evident, for a tenant is thereby prevented from acquiring a title by adverse possession against his landlord. The rule is so broad as to prevent a tenant, who has enclosed adjacent land long enough to acquire a title, from reaping the benefit of his action. His landlord, and not himself, profits by the acquistion. In such cases, so the courts declare, the tenant is acting for the benefit of his landlord—a kind of robber philanthropist, stealing for his landlord's benefit instead of his own.

In some cases a tenant has a right to contest his lessor's title; for example, after the expiration of the lessor's title during the tenancy. For, in thus attacking the former landlord's title, the tenant is not disputing the validity of the title under which he entered. In such a case he may also set up an independent title acquired by himself.

43. Sometimes land is let on shares; when this is done different relations may be established. The land-owner and tenant may create the relationship of landlord and tenant, or the very dissimilar relationship of partnership. If the intention of the contract is that the farmer shall do the work as the

servant of the land-owner, receiving for his services a fixed proportion of the crops, the contract is one of hiring and not a lease. Again, if the farmer is to be his own master, going on the land to plant, tend, and harvest the crops, which are to be divided, then the two parties are not tenants in common, except of the crops. But if the farmer, instead of acting as a licensee, is given possession of the land, though the rent is to be paid in produce, he is a tenant with all the incidents pertaining to tenancy.

Which of these relations exists when land is let on shares must depend on the construction of the contract. Sometimes these contracts are difficult to understand. In one of the cases the tenant was to cultivate and bag the hop crop as rent for the farm. The court held that the crop was the sole property of the land-owner. In another case an agreement between the two to share profits was held to be a partnership, because a division of profits necessarily implied this relation. There is a large number of cases, in which an entirely different rule has been declared, a division of the profits forming, in the mind of the court, no proper test of a partnership.

The natural increase of stock leased with a farm accrues to the tenant. To recover for the death of cattle in the tenant's possession, the landlord must prove negligence. If a lessee for years of a farm and stock sells part of it contrary to the lease the purchaser, after the termination of the lease by agreement of the parties, although within the term named, is liable to the lessor for the stock so sold.

44. From a tenancy thus created we will next consider a tenancy or estate created at will. This exists when a tenant has entered on land for the purpose of holding the same during the joint wills of both parties. The relation is not formed until the lessee has taken actual possession, and it may cease at the will of either party. To create this relation no rent need be fixed, no time set for the length of the occupation. "Such a tenancy cannot arise without an actual contract." When it does the tenant is entitled to a reasonable notice of his landlord's wish to end the estate before the latter can begin an action to regain possession. Thus, a tenancy was to exist for five years unless the lessor wished to build on the land; if he did, the lessee was to quit. This agreement, by providing for a notice concerning the lessor's intention to build, created a tenancy at will. If, without giving the notice, the lessor should enter and attempt to build, he would be a trespasser.

45. A tenancy created by words clearly showing an intention to endure only by the pleasure of both parties is an estate at will, though the rent may be payable by the year or lesser periods. If the tenant is to pay the rent at certain intervals, and the lessor terminates the tenancy between them, he cannot require any rent to be paid from the time of making the last payment. And the same principle is applied when the lease is by parol and the tenancy is ended by the lessor between the rent days. Thus, a parol lease is for a year, and the rent is payable quarterly. In the interval between two payments the lessor sells the premises and the

purchaser notifies the tenant to quit, which he does before another quarterly rent falls due. The tenant is not liable for the rent after the last payment.

46. A tenancy at will may be implied by the law. Thus, a householder permitted another to occupy his house free of rent. This was a tenancy at will. In another case the owner of a chapel and dwelling-house placed a minister in them as a minister of a congregation. Another instance may be given—that of a person who is let into possession of land under a contract to purchase or lease it. Generally, a person who, by the owner's consent takes possession of land without any facts or reason showing an intention to create an estate from year to year, is a tenant at will.

47. A tenant at will cannot acquire or create an estate that will avail against the owner of the land. If the tenant leases it this will be good between him and his lessee so long as the tenant enjoys the premises. A tenant at will who assigns his interest ends the tenancy, nor can the assignee claim the rights of the tenant at will against the original lessor.

48. Rent is not always incident to a tenancy at will. It often depends on circumstances whether such a tenant is chargeable for the use and occupation of the land he is occupying. For example, should a purchaser enter by virtue of a contract of purchase and sale, which fails by the vendor's fault, the vendee would not be liable for the use and occupation of the land save by express agreement. To make the vendee liable it must be shown that his occupation was by the purchaser's permission. If he is there without this

permission he is liable only as a trespasser, if at all. Again, a purchaser who is in possession under a contract to purchase, and refuses to perform his part, is liable for using and occupying the premises, but he is not a trespasser. By his refusal to perform his part he annuls the conditional license whereby he entered, and acts without it.

49. At the expiration of the relation the tenant at will is entitled to the crops, but, if he abandons the land before they are ripe, he loses them, unless his abandonment was forced by his landlord. Nor can the latter, by conveying the land with the growing crops, impair the tenant's right to them.

50. Any act or declaration indicating an intention to terminate the tenancy is sufficient for that purpose. On the part of the lessor a notice to quit, the demand of possession, an entry on the land whether the tenant is present or not, the carrying off of stone or trees against the tenant's will, the sale or lease of the land—all these acts clearly indicate on the part of the lessor, an intention to end the tenancy.

The death of either party also ends the estate; by the lessor's death, the lessee becomes a tenant at sufferance. Should the lessee die, his personal representative would have no right to the possession of the land after his death. If there be two lessors or two lessees the death of one does not terminate the tenancy.

In like manner a judgment for possession against the lessor, or an assignment of the lessor's estate under a process of insolvency, would end the lease.

On the part of the tenant an assignment of his

interest would put an end to the tenancy. It has been said that this is not so unless the landlord has notice of it; and until received, he may treat the lessee as his tenant and require him to pay the rent.

Though a tenancy at will may be ended in the manner above described, the law will not treat the lessee as a trespasser, should he enter within a reasonable time after the termination of his lease for the purpose of removing his crops or other property. This period is a fact which must be ascertained in every case by itself.

51. A tenancy from year to year may arise either expressly as when land is let from year to year, or by a general oral lease, without any fixed period and by the payment of annual rent; or such a tenancy may be implied by occupying property under a rent payable yearly, half yearly or quarterly, or when a tenant holds over after his term has expired without having entered into any new contract and payment. Such a tenancy, however, will not be created contrary to the intent of both parties, and payment of rent is simply evidence of intent. A lease for no definite term, with an annual rent, which may be payable quarterly or monthly is a lease from year to year. Also when one who enters into an agreement for a year is let into possession, and pays the stipulated rent, a tenancy from year to year is created. Generally an oral lease of lands for years is construed as creating only a tenancy at will. This, however, may be changed into a tenancy from year to year by payment and acceptance of the rent annually and by the cir-

cumstances indicating that such a lease was the intention of the parties.

A tenant for life or for years may lawfully cut trees needful for firewood and repairs to houses and fences even when he has agreed to make repairs at his own charge. But he cannot cut wood for sale.

52. A tenant from month to month does not become a tenant from year to year by continuing in possession for more than one year. Such a tenancy may be effected by special agreement, or it may be implied from the mode of making payments. Thus a lease for an indefinite term with the payment of monthly rent, creates a tenancy from month to month. A weekly tenancy is a re-letting of the premises at the beginning of each week.

53. For a long period the courts have sought to protect the interests of lessees against the sudden ending of their tenancy. To protect them more perfectly the courts finally required a notice to quit from landlords to their tenants before they could be actually expelled. This is obviously a just requirement, and the rule thus established by the common law has been greatly extended by statute, both in England, where the rule was first adopted, and also by all the states of the Union.

This notice is now largely regulated by statute, and there is not much need of saying more, except to give a brief description of the kind of notices required.

54. The notice to quit must be distinguished from the notice required to be given before undertaking summary proceedings to recover possession of land.

The object in giving the notice is to enable the tenants to remove their crops and other property, and thus be less at the mercy of their landlord than they would be, should he come immediately into possession by his own sole act, and claim and retain everything. At first the courts simply declared that the notice should be a reasonable one, but they have since fixed more definite times and rules to govern the parties interested in the possession of real property.

55. Of course, it may be fixed by agreement, and this will prevail over any statute. Generally, unless a time is thus fixed, it will be equal to the interval between the times of paying rent, as by the quarter, month, or week, or other period.

If, by agreement, or other construction of law, a tenancy is at will, though it may have been otherwise in the beginning, no notice to quit is necessary to end the relation unless required by statute. Again, if the tenant-relation, that once existed, has been destroyed, no notice is required before the landlord can act to recover possession of the land. Thus, if a possessor of land repudiates this relation, or sets up a claim that is hostile to his landlord's, no demand for possession, or notice to leave, need be given. Again, notice to a tenant who is in possession under a condition which is fulfilled, is not required. For example, a building was let to a person for a school, so long as he kept a good one. Failing to fulfil this requirement, the owner had a right to take possession without giving him any notice.

56. Finally, an illustration of terminating a tenancy

at will without giving notice is that of selling the land itself. Such an act is regarded as equivalent to a notice, and the tenant must act accordingly.

§ 19. By License

1. What is a license.
2. Kinds.
3. An executory license may be revoked.
4. A license can always be revoked where no party will suffer.
5. Death operates as a revocation.
6. When a license is executed the licensee is protected.
7. Can a license partly executed be revoked?
8. When the law implies a license to the purchaser.

1. A license is an authority to do an act or series of acts on another's land, without acquiring any estate or ownership therein. It includes authority to do whatever is neccessary to accomplish the end desired. It may be created orally, as it conveys no interest in the land, but simply a permission to use or occupy. An eminent jurist once remarked, "the publican, the miller, the broker, the banker, the wharfinger, the artisan, or any professional man who ever licenses the public to enter his place of business in order to attract custom, is a licensor, but, when the business is at an end, the license also comes to an end. Thus, one may open a way across his land for a public thoroughfare. Should he do so this would be regarded as a license for people to pass over the same."

2. Licenses are two kinds; executory, in which an act is to be done; and executed, in which an act has been done. The distinction is important, as we shall soon discover.

3. An executory license may be revoked at the pleasure of the licensor. This is the law everywhere. Thus, A laid an aqueduct across B's land, who afterward revoked his license, and cut the pipe that conducted the water. A sought the interposition of a court of equity, which refused to interfere, declaring that B. had a right to revoke the license at his pleasure.

Likewise, a license to cut a drain through the licensor's land, or build a culvert or dam, or flow land, or build and maintain a house, or lay water-mains, or cut trees, may all be revoked with respect to future action; but the licensee can remove his improvements.

Another example may be given: A land-owner erected a stand for spectators at a horse race, and sold tickets to all who wished to attend. Before the race was over the owner ordered one of the spectators to leave the premises, and afterward removed him. The court held that his ticket was a mere license which could be revoked at the owner's pleasure. The same rule has been applied in the case of a play at a theatre and a concert. But, if the purchaser suffers in any way by his removal, he is entitled to damages.

Another case may be mentioned—that of minerals—in which a licensee, after having incurred great expense, was forbidden by the owner to mine any longer. The revocation was declared to be valid, and the licensee was without a legal remedy.

4. A licensor may always revoke his license when the parties would be left in the same condition as they were before granting the same. On the other hand, the erection of an improvement on the faith of an oral license may go far to prevent its revocation. But licenses which in their nature amount to the granting of an estate for a time, however short, are not good unless they are in writing.

5. It is also a rule of law that the death of either party works a revocation of a license. So does a transfer of the interest of either party in the subject-matter. Thus, oral permission was given by a land-owner, who sold the timber growing thereon to another to take it out by a particular way. Afterward, he sold his land without mentioning the license. The purchaser was not bound to observe it.

6. The execution of a license relieves or excuses the actor from liability, otherwise he might be considered a trespasser. Thus, one who licenses another to tear down a mill-dam, or lay an aqueduct in his land, or cut down a tree, has no cause of action against the others, though he may have been greatly injured. Nor does this permission invade the statute of frauds pertaining to land, as no interest is conveyed therein.

7. The most difficult question perhaps relates to the revocation of a license after the licensee has enjoyed or exercised the privilege and incurred expense—erected, perhaps, a costly structure on the licensor's land. The licensee's rights in all cases of this kind are strictly construed. Thus, should a license be given

to another to erect a dam, this would not convey authority to rebuild if it were destroyed.

In many of the states the courts maintain that a license by virtue of which the licensee has incurred expense—for example, has erected a dam for the purpose of operating a mill—is not revocable. This principle is founded on the doctrine that an executed license transfers an absolute right to the licensee, because, after revocation, he is not restored to his original condition. The contrary doctrine is founded on the idea that the licensee, if permitted to exercise a license beyond the control of the other party, acquires an interest in land without a writing, and thus infringes the statute of frauds. An answer to this may be made that there are ways of acquiring land without a writing of which adverse user is a daily illustration.

8. The purchaser of an article, stone, trees, or the like, has a reasonable time to remove them from the land of the seller, for an implied license is given to him to effect their removal; nor can the seller forbid him from exercising, within a reasonable period, this right. Again, one who licenses another to cut trees on his land, with the intention of carrying them away, cannot revoke the license to remove those already cut in part execution of the license. But a revocation before any of them had been cut would be effective.

§ 20. Easements. Rights of Way, Light, Water, etc.

1. Easement defined.
2. How created.
3. How classified.

4. How acquired.
5. Sale of dominant estate.
6. Easement cannot be increased.
7. Selection of way from necessity.
8. Effect, on easement, of dividing dominant estate.
9. Acquisition of right of way by prescription.
10. Prescription does not run against a minor.
11. Tenant cannot acquire a right against his landlord.
12. How time is computed.
13. Prescription need not be exclusive.
14. Acquisition of a prescriptive right by the public.
15. Owner must confine himself strictly to the use of his right.
16. Owner of dominant estate must repair easement.
17. Right of way cannot be obtained orally.
18. What acts will work an abandonment of it.
19. Acquisition of easement of light and air.
20. How acquired.
21. Cannot be easily gained.
22. Right to enjoy a prospect.
23. Encroachment.
24. Easement in water.
25. Diversion.
26. Quality cannot be injured.
27. Surface water. Right of upper owner.
28. Right of lower owner.
29. Draining a swamp, well, etc.
30. Priority of use.
31. Underground springs.
32. Right to cut ice.
33. Lateral support.

34. Party wall.
35. Right to lateral support of highway.
36. Right of mine-owner.
37. Right to maintain an offensive trade.
38. Right to fishery.
39. Rights in division fence.
40. Rights in a wharf.
41. Landing-place.
42. Right to take gravel, etc., from land of another.
43. How easements may be lost or destroyed.
44. What are acts of abandonment.

1. An easement is the right of a land-owner to use the land of another for a special purpose. The owner who has this right is called the dominant owner; the other, whose land is thus used, the servient owner. These rights may relate to the use of a way, water, light, and air, support of the soil or buildings, party walls, etc.

2. To create an easement two estates must exist belonging to different persons, for no man can have an easement in his own land. Consequently, by becoming owner of both estates an easement is extinguished.

In other words, "the exercise of the right which, in other cases, would be the subject of an easement, is, during the continuance of his ownership, one of the ordinary rights of property only, which he may vary or determine at pleasure. The inferior rights of easement is merged in the higher title of ownership." [1]

3. Easements are divided also into affirmative and

[1] Kieffer v. Imhoff, 26 Pa., 442.

negative ones. The former permit something to be done on the land of another; for example, to pass over it, or to discharge water thereon. A negative easement consists in prohibiting one from doing something which would otherwise be lawful for him to do; for example, interrupting light and air from a building, or diverting a natural watercourse whereby the water is prevented from flowing to an ancient mill.

4. Easements may be acquired in three ways: by express grant; by implied grant; by prescription. Many easements are acquired in the former manner by a deed or writing. When thus created the deed itself defines the nature of the easement. Many also are implied. Thus, A sell to B land enclosed or surrounded on all sides by other lands belonging to A. As there is no way for B to reach his land except over A's, the law implies that, at the time of the sale, A intended to give the purchaser a right of way somewhere over the land still retained by himself. In like manner, should A sell a piece of land, reserving a portion in the centre, the law would imply the right on his part to travel over the land thus conveyed to another, in order to reach his own. Thus, it will be seen that the rule works in both directions to create ways of necessity, and the same principle applies in other cases. By prescriptive easement is meant the acquiring of a right by such use of a particular thing for a prescribed period as to create legally a title or right to its use. Thus, suppose A should walk over the land of B in a particular path for twenty years, claiming during that period the right to go there, he

would at the end of that period, acquire by prescription or adverse user, in legal phrase, the right to continue to go in this manner indefinitely; indeed, as perfect right may be acquired by going in this way for a period fixed by law, openly and adversely, as can be acquired by a written deed.

5. The sale of the dominant estate includes the easements belonging thereto, even though they are not necessary to the enjoyment of the estate by the grantee.

6. An easement cannot be increased beyond its original character.[1] Thus, should A sell to B a field for ordinary cultivation with a right of way thereto from the highway, he would have no right to divide the field into house-lots, build up a village, and subject this right of way to a larger use than originally intended. But a footpath acquired by prescription, by the members of one family residing on the dominant estate, may be used by other families residing on the same estate.[2]

7. The choice of the location of a way selected from necessity falls on the owner of the servient estate, who must select a route with due regard to the convenience of the owner of the dominant estate. Should the former fail or refuse to make the location, the owner of the dominant estate may do so, also having due regard to the other's reasonable convenience. When the way has been selected it cannot be changed by either party without the consent of the other. The same doctrine applies in locating an aqueduct or any other easement.

[1] 2 Washburn, § 1234, p. 278.
[2] Baldwin v. Boston & Maine R. R., 181 Mass. 166.

In applying this rule to trees, should A sell his land to B, reserving the trees growing thereon, he thereby reserves a right to enter on the land and to cut and carry them away. On the other hand, should he sell the trees, the right to enter and carry them away would likewise pass with the grant. Again, in applying this rule to mines, should one sell land and reserve the mines therein, this would include the right to pass over the land sold and do whatever would be necessary for carrying into effect the privilege or right retained.

8. Sometimes a dominant estate to which an easement is attached is divided, and the question then arises concerning the future of the easement. The owner or assignee of any part may claim a right to the easement so far as it may be needful to the enjoyment of his property, provided the burden or charge of the easement on the servient estate is not increased. In one case a person sold a piece of land opening on another lot, which the grantee guaranteed should remain open for purposes of light, etc. The grantee sold a part of his estate to C, and then the original grantor, having sold the open lot to D, the latter began to build thereon. On the application of C, the court restrained D from continuing his purpose.

9. It is often difficult, with respect to prescriptive estates, to determine whether the right has been fully acquired. Originally, the time for gaining the right was a date anterior to the memory of man. At one time in the history of English law this was fixed at the beginning of the reign of Richard I. Instead of an indefinite period, the courts in this country began to

fix on a definite time of twenty years, in analogy to the statute of limitations concerning the entry into land. In many states this period is limited to fifteen years or twenty years. The use, to ripen into a prescriptive title, must be uninterrupted and having the actual or implied acquiescence of the owner under an adverse claim of the right, since no length of enjoyment by the land-owner's permission will ripen into an easement. The inference of a grant, if perfected at all, is derived from a claim of right on one side and yielding on the other. In one case two adjacent owners built a party wall between their estates, resting it upon an arch, the respective legs of which stood on the lands of the different owners. The archway was used by them as a common passageway, and this was held by the court to be such an adverse user as to give to each a prescriptive right to have the wall thus supported. It is no objection to the acquisition of an easement in this manner that it began by permission, if the adverse claim is subsequently set up and maintained during the requisite period as a right.

Hundreds of cases have been tried involving the question, what kind of use is adverse. In one of them a person turned his cattle on land between which and a beach there was no fence. The cattle constantly wandered on the beach to look at the sea and to pick up crabs, and the farmer finally claimed that by thus wandering on the beach they had acquired a title thereto for him. The court decided otherwise. One test often applied is whether such a use is injurious to another or not. If it is not, it is said that it will

not create a right by prescription. The test is not always correct. Again, permission to use the land of another negatives the idea of prescription, though, as we have said, a person may, in fact, after occupying land permissively, lay claim thereto as a matter of right. Again, it is said that the owner must know of such a user in order to render it effective. But acquiescence, presupposes knowledge. Nevertheless, it is maintained that even a right of way cannot be acquired by prescription without the acquiescence, actual or implied, by the owner. But the presumption of acquiescence arising from actual knowledge may be rebutted by a proof of legal proceedings and denial of the right.

10. It should be added that, for a use to be "adverse," it must be against someone who is capable of acting. Consequently, a user will not begin to run against a minor, nor an insane person, nor against anyone while possessing a legal disability to act for himself in defending his possessions.[1]

11. Again, one in temporary possession of an estate as a tenant cannot by a user acquire in the land of another any easement that will continue any longer than his own estate. Thus, if a person, occupying under a lease of thirty years, should acquire an easement over the land of another by adverse user during the period fixed by law, the easement would come to an end on the cessation of his tenancy. In like manner a widow who might be enjoying her dower and also

[1] 2 Washburn, § 1255, p. 299. "But a disability arising after the use has become adverse, does not suspend the acquisition of the right or extend the time necessary to acquire it." Ibid.

an easement connected therewith, would lose all right therein on the cessation of her dower estate.

12. In computing the time of enjoyment the user need not be by the same person during the entire period. Thus, if one who had enjoyed an easement, say for ten years, should die and his heirs should continue to use it for the remainder of the time required by law to complete his right, it would be gained.

13. In thus claiming an easement the prescription or use need not be exclusive. Other persons may, during the same period, have used or acquired the right. In other words, different persons may claim and acquire the same way or other right by different users.

14. So, too, they may be established by dedication, which is a method clearly distinguished from that above described. If the dedication be express there must be an appropriation of land by the owner to public use "by some express manifestation of his purpose to devote the land to the public use." If the dedication is implied, this results from "some act or course of conduct from which the law will imply such an intent." [1]

15. The law is strict in requiring the owner of an easement to confine himself to his express or implied grant.[2] A person who has a way for one purpose and makes use of it for another becomes a trespasser, as clearly as if he had no easement at all. A footway, therefore, cannot be used as a horseway, nor a carriage-

[1] Elliot on Roads, § 121, p. 133.

[2] See § 6. Washburn on Easements, § 9, p. 135. Says Kerr: "A right of way acquired by prescription for a special use or purpose cannot be used for another and different purpose." 3 Real Property, § 2216, p. 2219.

way for driving cattle thereon. In one of the cases B's right to use a way for carrying off the farming produce of his land gave him no right to carry lime from his land over the same way. The law is perhaps still more strict in the case of grants that are implied. It compels people to restrict the use of the easement to such purposes as are reasonably connected with the use of the land granted.

16. The owner of the dominant estate is bound to repair the way; though the owner of the servient estate may, by contract or prescription, be required to make the necessary repairs. And when the owner of the servient estate is thus required to repair the way, the other owner may pass over other land of the servient owner if he has not maintained the way in a proper manner. Such an additional use of the estate of the servient owner, however, is strictly limited by necessity.

17. As a right of way cannot be acquired by a mere parol agreement between the owners of the two estates, in like manner a right of way cannot be abandoned or surrendered orally. But an executed oral agreement to discontinue the use of a way has been regarded as sufficient evidence of a surrender.

18. What acts will operate as a surrender or abandonment must be determined in each case by itself, and this must be an act or acts done by the owner of the dominant estate, or with his consent, by the owner of the servient estate. Thus, one who had a right of way by a grant for a piece of land made an impassable fence across the same for seven years, and the easement was not extinguished. But the cases are not

uniform on this subject. Many of them admit that a way may be abandoned by acts of a comparatively short duration. The test is the intention with which the acts are done.

19. Many of the rules we have given relating to the acquisition of ways apply also to easements of light and air. From their nature, the original acquisition of the right to their use must be in a different manner. Thus, an uninterrupted enjoyment of light and air over and across the land of another for twenty years or more is sufficient to acquire such enjoyment. Nevertheless, the enjoyment cannot be said to be adverse, for the very nature of light and air forbids or prevents such a user.

A land-owner has no right to complain of any use that may be made of adjoining or neighbouring land, unless he has acquired some right therein. A neighbouring owner may therefore use his land for any legal business whatever, or erect any structure thereon unsightly to the feelings of the adjacent owner, or injurious to the value of his property. "Likewise the owner of land cannot object that his building is deprived of light by an erection on adjacent land, that a view from his premises is cut off thereby, or that the view of his shop windows or signs by the public is so cut off. Nor can he object that windows are placed in a neighbouring building so as to enable persons to look into his windows or yard, his only remedy being to construct a building or fence which will shut off the neighbour's view of his premises. It is entirely immaterial that one's motive in so using or

improving his land as to annoy his neighbours is malicious, and for the sole purpose of injuring the latter, provided the act be otherwise lawful." [1]

The owner has a natural right to have the air diffused over his land in approximately its natural condition, free from pollution by smoke, dust or vapours, or by disagreeable odours. The violation of this right is a nuisance which entitles him to recover damages for the injury, or an injunction to prevent these things from happening. If a person sells a part of his land the law does not presume that he also sold the light and air on the portion unsold, thereby preventing him from making as complete sale of the remainder. In one of the late cases the court held that a grantor or purchaser of a part of a tract of land has no implied grant or right of light and air as against a subsequent bona fide purchaser of the remaining portion, unless his use of it is so evidently necessary to the reasonable enjoyment of the first purchase as to clearly indicate to the second purchaser that it was the intention of the parties to the first sale to create and continue such right, and to charge the second purchaser with knowledge that law and equity forbade him, if purchasing, from so occupying his part as to interfere with the right to the light and air of the other.[2]

20. A person does not acquire a right to light and air across another's land for the benefit of his house by simply erecting it on the border of his own land, while the adjoining land is unoccupied.[3] The reason is, by

[1] Tiffany on Real Property, § 650.
[2] Robinson v. Clapp, 66 Conn., 365.
[3] This is the American rule.

making windows in houses, the act is not an adverse use of another's property, for, in doing so, a person does not interfere in any way with the free enjoyment of the land by the adjacent land-owner. The adjoining owner may, therefore, at any time erect a house on his own land, thereby obstructing the light and air of another. Again, the owner of a house who has acquired the right of easement of light and air through a certain window, by closing it up and opening another of a different size and in a different place, loses his right altogether. In like manner, if he tears down an old house and build a new one, his windows must be the same in size and position as those in the old house. It is said that the mere enlargement of a window would not destroy the easement if the other estate was not thereby more heavily burdened. Nor would a change in the uses of a room lighted by such a window make any difference. A person may be enjoined by an adjoining owner who suffers special injury in the way of light, air and access caused by the display of merchandise. The public also have some rights which should not be disregarded. "As a general rule, the public are entitled not only to a free passage along the streets, but to a free passage over each and every portion of the street."[1]

21. In this country the rule is spreading that a prescriptive right to the enjoyment of light and air cannot be easily gained as an easement because it is incompatible with progressive changes, especially in the cities.

[1] Lavery v. Hennigan, 52 N. Y., Super. Ct., 463, 467.

But there is nothing to prevent the acquisition of light and air by an express grant or agreement.

22. The right to enjoy a prospect from one's estate as an easement cannot be acquired by any user, however long continued, nor will such a right, except a street view, pass by implication. Nor can a person maintain an action against another for erecting on his own land an obstruction to the former's view, unless the right has been acquired by express agreement.

23. An owner may also suffer from an encroachment. This may consist of a great variety of acts; a common one in cities is to insert beams and other structures beyond the dividing line. From such acts the owner may sometimes obtain relief by removing the encroachment. In so doing he must use great care to remove only the excess, and to cause no needless injury. Another way is to compel the encroacher to remove his encroachment. A court will not always order this to be done if the cost of removal be great and the encroachment be slight. When refusing, however, the encroacher is required to pay for his benefit.

When the wall of a building erected by a lessee gradually encroaches on an adjoining lot, forcing the wall outward and causing it to crack, the adjoining owner may recover against the lessee.[1] An owner may maintain an action for the erection of a bay-window which extends over his line by the adjoining owner, although that portion of his land covered by the bay-window has been used as a highway. Furthermore, evidence of a custom to erect bay-windows in this

[1] Hoffenberth v. Myers, 42 N. Y., App. Div., 183.

manner cannot be admitted for the purpose of defeating a recovery. It was said in a Boston case: "If it be a custom to erect them over the land of other people, such a custom is illegal, and the defendant cannot justify himself in occupying his neighbour's property as a part of his dwelling-house on the ground that such trespasses are customary in Boston." [1]

An owner of land has the same duty to keep on his own land a house or wall built thereon as to keep the filth in his cess-pool, or the water in his reservoir, or the snow on his roof. His duty is to keep it in such a state that his neighbour may not be injured by its fall,[2] but there is no implied obligation between owners of distinct parts of a building which will enable one of them to maintain an action against the other for mere refusal and neglect to repair his tenement.[3]

24. The use of water may also be the subject of an easement. The general rule is, any person through whose land a stream flows may use it. Therefore, a proprietor above cannot divert the stream or cut it off, or in any way seriously injure the rightful use of it by the owners below. But every person can make some use of the water while passing over or through his land, and, for the purpose of using it more effectively, can impound it for a reasonable period. Many exceedingly important questions have grown out of the legal uses that may be made of it during its course. Thus, persons have a right to use the water for purposes of irrigation, or for watering their cattle, and yet there

[1] Codman v. Evans, 87 Mass., 308.
[2] Kappes v. Appel, 14 Ill., App., 170.
[3] Pierce v. Dyer, 109 Mass., 374.

is clearly a limit to the use—even for these purposes —that anyone can make of it. If there were not a limit, perhaps a few, by making a too liberal use of the water, might exhaust the entire stream, leaving none for other riparian proprietors. To what use, therefore, is each individual limited? Such use as will not seriously affect the usual quantity. From this answer it will be seen that the question is an open one in each case. In some sections of our country this mode of obtaining moisture for lands is coming more and more into vogue; in these the question possesses the highest importance to the respective proprietors.

25. Should a riparian owner divert a stream, as indeed he may on his own land, it would be his duty to turn the stream into its former bed before debouching from his land.

26. Formerly, a riparian proprietor could not seriously injure the quality of the water. A mill-owner had no right to put dyestuffs or the refuse of his mill into the water to the injury of the other owners below who might wish to use it as a supply for watering their cattle, or for house purposes. This rule, like many others, has been greatly modified by the changed industrial and social conditions of more modern society, as we shall shortly explain.

27. In treating of surface water some difficult questions also have arisen. Two men own adjoining lands on a hillside, one above, the other below. Several suppositions may be made. First, if the upper proprietor desires to conserve or use all the water, can he

do so? Again, instead of suffering it to drain off naturally, he makes artificial ways whereby it flows into or upon the land of his neighbour in one or a few places. Again, he is angry at the lower proprietor, and knowing that he is desirous of obtaining as much of the surface water as possible, spites him by digging a channel on the lower edge of his land through which the water runs into the street.

28. Let us look first at the lower proprietor. Can he prevent the natural flow of water by building an obstruction across the upper edge of his land whereby the water will accumulate until it finds an outlet in some other way than across his land? Or, to put the principle in another way, has the lower proprietor any right to prevent surface water from flowing off across his land by virtue of its gravity?

To two of these questions answers may be given. The upper owner has an absolute right to erect such obstructions as will prevent his land from injury by diverting the water into the highway, perhaps, or into some other place, although the use of it may be valuable to the adjoining owner below. Again, the lower proprietor has the same rights as the one above him to make such an embankment as will prevent the water from entering his land. This is not the law everywhere; in some states he cannot prevent such a natural course of the water as from a highway to a lower field.

There is a just distinction between subjecting the lower land to the ordinary usual servitude, the ordinary flow of surface water, and surface water unusual in

quantity and impaired in quality. But is it just to subject the lower owner to an unusual flow caused artificially, or to water that is impure by reason of human action, without giving him compensation? Ought not the rule that applies to the defiling of a natural stream be applied in such cases?

29. A man may drain his swamp, though by so doing he may prevent the water which formerly collected there from finding its way into the stream, and thus diminish its volume. Likewise, the owner of a well, that is accustomed to overflow, may prevent such action, though in doing so he prevents it from draining into a ditch extending to a mill stream. But the owner of a spring that issues out of the ground, and flows in a natural channel into the land of another, cannot give a new direction to the stream, nor use the water on his own land to the other's injury. The character of surface water cannot be changed into a watercourse merely by collecting a considerable quantity.

30. A person may, by priority of use, acquire a right to the undisturbed enjoyment of water. Thus, should a person erect a mill and use the water for a period of twenty years in a certain manner, the other proprietors above and below him could not disturb his use of the stream in the future. But he cannot change the nature of his acquisition in any manner. If, for example, he had been in the habit of damming the water for a given length of time, this would not justify him in retaining the water for a longer period.

31. Though a watercourse cannot be diverted, except on the owner's own ground, this does not apply to

water or springs running beneath. Consequently, in digging a well or tunnel, should the source or supply of another's well be struck and cut off, this would be a damage without redress. In one of the cases the court states the principle in this manner: "If a man digs a well in his own field and thereby drains his neighbour's well, he may do so unless he does it maliciously."[1] This principle, however, does not apply in places where the chief source of supply is percolating water obtained by artesian wells. In such places a land-owner has no right to sink wells on his land and draw off the water supply of his neighbours, whereby their trees, vines, and other plants perish.[2]

32. The right to cut ice is a natural right incident to riparian ownership. The riparian proprietor has the same right in the ice as in the water, for this is simply water in another form, and the limitation, therefore, is in the same—that he must not cut enough to appreciably diminish the flow of the stream to the injury of the lower proprietors.

33. Another easement is the natural right of the lateral support of land. The rule is that no person can use his land to the injury of another. Therefore, if he should excavate to the edge of his land, and his neighbour had a building adjoining the same, he could not continue this work to his neighbour's injury. Much litigation has grown out of the carelessness or ignorance of persons in not observing this principle. Everything turns on the manner of excavation. This must be done in a prudent manner, otherwise it is a wrong

[1] Acon v. Blundell, 12 Mees & Wels., 336.
[2] Katz v. Walkinshaw, 141 Cal., 116.

for which the excavator must respond in damages. In nearly every large city this matter is regulated by ordinance.

Nevertheless, the owners of adjacent houses may acquire the right of a lateral support for a wall against that of another; for example, the purchasers of several houses in a block, built, owned, and sold by a single owner. But neither of two persons owning adjoining houses has a right to the support of the other independently of agreement; nor does any length of time furnish evidence of one.

One cannot acquire the right to the lateral support of a building by prescription. Says the Supreme Court of Massachusetts: "It is difficult to see how the owner of a house can acquire by prescription a right to have it supported by adjoining land inasmuch as he does nothing upon, and has no use of that land which can be seen or known, or interrupted or sued for by the owner thereof, and therefore no assent of the latter can be presumed to the acquirement of any right in his land by the former."

34. This easement must be distinguished from the right to use party walls, so called, by which we mean walls used for the common benefit of adjoining houses or buildings. But an owner who sets his house on the land of an adjacent owner, and erects a house thereon and inserts the beams into the wall as far as the line dividing the estates, does not thereby use a party wall as the term is here used. It is not necessary that a party wall should stand equally on adjoining lands. The rights of the parties may be determined by agree-

ments or by user. In cities, especially, agreements are usually made defining the rights of the respective parties. A wall built at the joint expense of two parties, which stands one-half on the land of each owner, does not belong to them as tenants in common. Each owns his part in severalty, though each has a right to use the wall as an easement. If one carries up his part higher than the other, he does not become liable to the owner of the other half unless he is injured by the wall. Prescriptive rights may be acquired in the use of party walls, to which the same principles apply as in acquiring ways.[1]

35. The owner of land abutting a highway has no right to the lateral support of the soil of the street. Consequently, should the public authority lower the grade, and the owner's house in consequence fall, or the wall be weakened, he would have no claim against the public.

36. A mine-owner has no right to excavate minerals in such a manner as will endanger the surface. The laws in many countries have provisions respecting the mode of timbering the mines and of leaving portions of the mineral as supports for the land above. In a coal mine, especially if the coal be of fine quality, the temptation is, to use a mining phrase, to "rob the pillars," thereby weakening the roof, and resulting not infrequently in terrible disaster. A sale of coal land with all the privileges pertaining to the working and using of the mines does not give the right to remove the surface supports, even if this be the usual

[1] For party wall agreement see Vol. VI, Appendix, No. 4.

mode of mining; for the usage is illegal. But the purchaser of land containing a release from all liability for any injury resulting from removing the surface supports, may remove them without liability. The right of support for the surface land is limited to the land itself and does not extend to buildings.

37. One may acquire also, as against his neighbour, a right to carry on an offensive trade on his own premises by exercising the right without objection for the period required to obtain a right by adverse user.

38. In like manner a right of fishery may be acquired by adverse user in the manner previously described. But no prescription runs against the owner of the waters, who is a minor, until he has attained his majority. Again, if such a use had begun in his father's lifetime it would be suspended, after his death, during his son's minority.

It is said that "no prescriptive right can be acquired against a sovereign nation or state." This is true enough in its application to the United States,[1] but is too broad in its application to the states. A careful law writer has stated that the right of the public to lands dedicated to its use for streets, highways, and parks "cannot by one line of authorities be extinguished by any adverse possession, however long continued." By another line quite as long "the statute of limitations runs against municipal corporations the same as it does against private persons."[2]

39. An easement may be acquired in a division fence,

[1] Schneider v. Hutchinson, 55 Or., 253.
[2] 14 Am. State Rep., 278. See Orr v. O'Brien, 77 Iowa, 253, and Hoadley v San Francisco, 50 Cal., 274.

whereby the owner on one side may require the other to make and maintain a portion, or all of it. Of course, the right would be extinguished through the purchase of both pieces by the same person. If, on the other hand, the land should happen to be sold on one side to which the burden or benefit was attached, the purchaser would stand in the place of the previous owner, and be subject to the burden or enjoy the benefit, as the case might be.

40. An easement may be acquired in a wharf. One who erects a wharf below low-water mark, which is maintained for the required period, acquires a right to the use of it. His acquisition is limited only by the public right to free navigation, with which he cannot interfere.

41. In some cases an individual can acquire an easement in a landing place. This is determined by local usage. The same thing may be said of the right to take water from a spring or from a well, or to pass a given place or port free of toll.

42. A customary right to take things from another's land, such as gravel or sand for a building, cannot be acquired in favour of the residents in any particular unincorporated town or village. But an individual or a body politic and its successors may also acquire the right. For a body politic, like a town, to acquire the right, their acts must be of a strictly corporate character, because the acts of individuals are regarded as their own, and not representative acts.

43. An easement may be lost or destroyed in various ways. It may be released by the owner of the domi-

nant estate to the owner of the servient one. It may be lost by abandonment, but a mere non-user will not in any case thus operate. If the non-user be explained by showing that the way was not abandoned, but was less convenient than another which had been acquired, this fact will afford clear evidence of an intention not to abandon the other. A mere non-user for any time, not less than that required by law for establishing a right by prescription, will work an abandonment.

44. What are acts of abandonment? To preserve a dam, partly destroyed, in that condition, is an abandonment. Anyone above or below a mill-owner who tears down his mill with the intention of not occupying the privilege again may employ the stream for a new mill. Intention largely enters into the determination of the question. Thus, one who had an ancient pond, afterward dug three others, and suffered the first to become filled with rubbish. Subsequently, his title to the latter ponds having proved defective, he made use of the old one. This, the court held, he had a right to do.

§ 21. Individual Use of Waters

1. Right to natural flow of stream.
2. Rights of individuals in other bodies of water.
3. Regard must be had to the application of the principle.
4. What is a reasonable use?
5. Cities are entitled to same rights as individuals.
6. Owner's right in a non-navigable stream to exclusive fishery.

7. Rights of public in public water.
8. Rights of navigation.
9. Rights of public to raise and lower stream.
10. Employment of contiguous land for pleasure.
11. Taking ice from public water.
12. Rights of irrigation.

1. Every riparian owner has a general right to have the stream flowing by or through his land flow in its natural purity. This does not mean that there can be no pollution whatever. Every riparian owner can make reasonable use of a stream, but what is such a use of it is a question of fact—and of increasing difficulty.

2. The principle on which water rights are founded applies to all bodies of water, whether large or small, tidal or non-tidal, but the rights of the public require those of individuals to be more narrowed in some instances than in others. "The courts," says Farnham, "do not fully agree in their enumeration of these rights. Some concede more than do others; but all accord to the owner of riparian land the right to have the water remain in place, and to retain, as nearly as possible, its natural character. This prevents the obstruction by the public of the water-way, or the pollution of it to the injury of the riparian owner. He is also entitled to have his contact with the water remain intact. This is known as the right of access, and includes the right to erect wharves to reach the navigable portion of the stream. The wharfage right however is subject to some limitations. The right of access also gives the riparian owner a preference

should the land under water be sold, the title to accretions, also the preferential right to fill out if this be permitted to the public. He may also use the shore immediately adjoining the land. This gives him the preferential right to secure the ferry franchise and the right to draw nets to his shore and to gather the material thrown on his land by the water. Again, the riparian owner also has the right to the free use of the water space immediately adjoining his property for transacting business. Although the public has a right to navigate every part of the river not actually in use, yet his local interests give him the prior right to make use of the space adjoining his property so that vessels cannot anchor there in a way to interfere unreasonably with his use of his property. "Besides these rights," says Farnham, "there are others which come to the riparian owners by nature of which he cannot be justly deprived by the public without compensating him."[1]

3. Regard must be had for the occasion and manner of applying the principle; the kind of business; the importance and necessity of the use, and matters of that kind. In a very important case the court remarked that, among other things, may be considered the state of improvement of the country with respect to mills and machinery and the use of water as a propelling power.

4. A reasonable use of a stream may be different in one place from the use of a stream in another. This may be illustrated by a case that occurred some years

[1] Law of Waters, 279, 280.

ago in Wisconsin. Waters of a stream were rendered impure by a cattle-stable, so that the riparian proprietor below could no longer use them for domestic purposes. The court held that there might be such a special damage to the lower owner as would entitle him to a remedy against the upper proprietor. On the other hand, if the use of a stream in that manner by many of the proprietors along its borders was general, this might be a reasonable use of the stream. The question was put in another way. All the proprietors along a stream can make the most effective use of it. Is such a use for domestic, commercial or some other purpose? If, on the other hand, it was the principal source of water supply for the people living on its borders and for their cattle, this certainly would be the principal use of the stream, and would determine the character of the reasonableness of its use.

This view was maintained by the Supreme Court of Pennsylvania concerning a stream that was used for carrying off the acidulated waters of a mine. A woman built a fish pond that was fed by the stream. At first the fish flourished; then they sickened and died. After their death followed the discovery that the waters of the pond had become impure by the action of the mine-owners. At the first trial the Supreme Court decided the mine-owners had no right to defile the stream which had been conveying pure water from the earliest days. Unwilling to abide by the decision the mine-owners desired a rehearing, which was granted. On the second trial the court had a larger comprehension of the question. It was then seen that

the use of the stream as a sewer or receptacle of the waters of the mines was of much greater consequence than for a fish pond, or even for domestic purposes. The most important use of the stream, therefore, determined the mode of its use, and so the court, reversing itself, held that it was a proper thing for the mine-owners to discharge the waters of their mines in this manner. Necessity, therefore, had established the rule. The water must flow somewhere, and if the mine-owners were not permitted to relieve their mines of water, which, by natural gravity, must flow into the streams below, they would be obliged to suspend operations.

In like manner a salt-manufacturing company in New York destroyed, by their operations, the use of a stream for domestic purposes. Nevertheless, the court held that this was a reasonable use of the stream. But if a manufacturing plant, which thus pollutes the water of a stream, can continue business without being seriously affected, then a different rule would apply.

5. Cities, as riparian owners, are entitled to the same use of a stream as other owners, and if such reasonable use results in polluting it, no liability follows. In a recent case in New York the court declared that the indispensable public necessity of cities and villages for drainage often rendered the use of such streams as sewers a reasonable one. The courts of Indiana have gone the entire length in holding that a city located on the banks of a stream may discharge its sewage therein, and that it is the necessary and only practical means of disposing of it. In New York

the rule is not so sweeping, and the courts declare that this right is not absolute under all circumstances, irrespective of the size of the stream or the natural purpose which it subserves.

In a recent case in Massachusetts the court remarked that, when the population on the banks of a stream becomes dense, it naturally and necessarily suffers a still greater deterioration; roads and streets crossing it, or running by its side, with their gutters and sluices discharging into it their surplus water collected over large areas, are abundant source of impurity against which the law affords no relief.[1] A city's use of a stream to carry away surface water is generally reasonable.

Cities, then, are governed by the same rule as individuals in using a stream, and if, as incidental to a reasonable use, the stream is to some extent polluted and rendered unfit for ordinary uses by lower riparian owners, they have no just cause for complaint. Furthermore, a reasonable use by a city of necessity causes a greater pollution than does a reasonable use by one individual. But, in an important case in New Jersey, it was held that the pollution of a river by the discharge of city sewage, gathered from a large area by means of an artificially constructed system, could not be justified as a natural and reasonable use of the river.[2]

6. The owner of land through which a non-navigable stream flows has an absolute, exclusive right to fishing therein on his own land. This right must be so exercised as not to injure the rights of others on the stream above or below him.

[1] Merrifield v. Worcester, 110 Mass., 216, 220.
[2] Simmons v. Paterson, 60 N. J., Eq., 385.

7. The public have the right to use all bodies of public water. These rights include boating, fishing, and the use of the water or ice for ordinary purposes. In this regard a riparian owner has no exclusive or peculiar privilege.

As the rule is universal, that navigable streams are public, individuals having a right to use them as a highway, this right cannot be taken away or narrowed by any prescription on the part of individuals, though they may acquire some rights, in this way as against other individuals.

8. Except salt-water streams, the question concerning the navigation of a stream is one of fact, and must be established by those who seek to use it. Furthermore, the stream must be navigated in its natural state, unaided by artificial means or devices.

9. The owner by a public body of water cannot prevent an injury to his land by the lowering or raising of the waters beyond the natural limits of high- or low-water marks by artificial means in the exercise of rights common to all, unless he has express authority to do so by law.

10. The employment of contiguous land for the purpose of pleasure, recreation, and health constitutes such a use of adjacent bodies of public water as to command a remedy for interference with its natural condition.

11. The taking of large quantities of ice from a body of public water, to ship to a distant market for sale is not the exercise of the common right if this results in a special injury to a riparian owner. Consequently

he may enjoin the taker from cutting and removing the ice, and also sue in his own name for the damage he has incurred. This rule, though, does not prevail everywhere.

The taking of water or ice from a body of public water by common right may result in destroying the source of supply, and no riparian owner or common user can complain; but when the use is made of such water for commercial purposes, not of common right, the right of using the water in the above manner ceases where the conflict of interest with the common use for commercial purposes begins. In other words, the use of the water for commercial purposes is deemed of the highest importance, and therefore determines its use whenever a conflict of uses arises.

Lastly, the taking of ice from a body of public water as a business and for sale, is not an ordinary use of the water by common right. It is an artificial use, which may be enjoined by a riparian owner who is thereby injured.

12. Lastly may be considered the right to use water from a stream for irrigation purposes. The rule has long existed that the riparian owner may thus use the water so long as he did not infringe on the rights of other persons having an equal right to the water. And as the population spread to the western part of the country where the rainfall is not sufficient to furnish an adequate supply for crops to grow the rule was applied there. This right to use the water for irrigation purposes is a property right of which the riparian owner cannot be deprived except for public use on

making or tendering due compensation. And the right is available not only to the owners of the land, but also to one who has located on land belonging to the government with the intention of obtaining title thereto.

To what extent may water be thus used? If the climate is unusually arid, and the character of the soil is sandy, with a small flow of water it would be very easy for the persons owning land near the head of the stream to consume the entire flow and leave nothing for the riparian owners lower down. The first limitation is, that the water must be principally used for the support of life, by furnishing what is necessary for quenching the thirst of men and animals and for cooking their food. Another limitation is, that the use of water for irrigation cannot be so exercised as to interfere with the lawful use of water by a lower proprietor. Again, how is this right affected by the existence of other rights, for example, the right to use the water for milling purposes? Farnham says:[1] "While the two rights may be equal so far as their respective claims are concerned, the natural position of the one desiring to use the water to furnish force is superior to that of one wishing to use it for irrigation, because his use does not consume the water but leaves it to flow on to the lower owner, and therefore he has an advantage not possessed by the one desiring to irrigate his land. But both the right to utilize the flow of the stream to furnish power and the right to use the water for irrigation are inferior to the use of it for quenching thirst, and, as between the two, the

[1] 3 Law of Waters, p. 1800.

question which is superior may depend upon the locality, needs, and customs of the people." In a manufacturing community where milling interests have been established on the faith of the right to the flow of the stream, and the ordinary rainfall is ample to supply the needs of agriculture, it may be that water cannot be taken from the stream so as to interfere with the flow of water to the mills. "In other sections of the country the conditions may be such that the agricultural interests are paramount, there being few mills, and the need of them not great. Under such circumstances it may be unreasonable for one requiring a mill upon the stream to insist that there shall be no interference with his power by the diversion of the water for agriculture." The final rule therefore is, "that the use made by every owner after the necessities of life are satisfied must be such as to be reasonable under all the circumstances of the case, with no priority in favour of any interest." What is a reasonable use is a question of fact, in view of all the interests involved and all the circumstances under which the respective owners desire to make use of the stream.

CHAPTER V

USE OF HIGHWAYS

1. In driving each must keep to the right.
2. This rule is not always applied.
3. Especially when crossing or turning into a road.
4. A person driving on the wrong side assumes the consequences.
5. All who use a public street must exercise reasonable care.
6. Rights of travellers going in same direction.
7. Rights of walkers.
8. Rights of children and infirm persons.
9. Duty of persons carrying dangerous tools.
10. Duty of a person transporting articles that may frighten horses.
11. Travelling at a dangerous speed.
12. Criminal liability for fast driving.
13. A traveller must keep his carriage and harness in good condition.
14. Liability for a runaway.
15. Liability is often determined by the proximate cause of the injury.
16. Liability when both are at fault.
17. A passenger is not responsible for negligence of driver.

18. Rule that applies to a servant.
19. Right to stop.
20. Right to drive animals through the street.
21. Use of new means of travelling.
22. Bicycle.

1. In describing the rules of the road the most general of all is that each party must keep to the right. This is directly contrary to the English rule. Where the rule is not prescribed by statute, courts will take judicial knowledge of the custom. And a statute providing that a traveller shall pass to the right of the centre of the road means the centre or travelled portion. When this is hidden by snow and a temporary path is made elsewhere, persons who meet therein should drive to the right of the centre as if it were a permanent way.

2. The above rule is not inflexible. Occasionally there are good reasons for not observing it. Thus, on some occasions a light vehicle should give way to a wagon heavily loaded; on others, the heavier wagon should stop and suffer the lighter vehicle to pass. Nor does the general rule apply to a building which is being moved through a street. If the movers are acting in accordance with law in thus obstructing the highway temporarily, persons who are passing to and fro must govern themselves accordingly.

Another limitation must be mentioned: the rule does not apply to driving in city streets.

3. The above rule does not apply to those who are crossing or turning into a road, nor to a driver who

meets a walker. A person while driving across a road must not obstruct public travel unduly and prevent others from passing along the way.

Street railways are not exempt from the operation of this rule. They must not unnecessarily obstruct the crossings. Travellers in other vehicles need not refrain from using the track at proper times; provided they exercise due care, and do not impede the movement of the cars.

4. A person who drives on the wrong side of the way assumes the risk of his conduct. Furthermore he must use greater care than if he kept on the other side. Should he collide with another the presumption would be against the person who was on the wrong side; nevertheless the other has no right to neglect all precautions. If the collision could have been prevented by his exercise of ordinary care, he cannot complain.

5. Persons who lawfully use a public street owe to each other the duty to exercise reasonable care, and every one is justified in assuming that every other person will act in the same manner.

6. What are the rights of travellers driving in the same direction? The leader is not bound to turn to either side if there be sufficient room for the others to pass. If there be not enough, Angell has said it is the duty of the foremost traveller, after a request has been made to him, to yield an equal share of the road to the requester, provided he can pass. If he cannot the passing must be deferred until the travellers reach a more favourable place. Elliott, the last and best authority on this subject, says it is perhaps doubt-

ful if such a duty can be deemed absolute, and even if it should be so considered, the failure of the leading traveller to turn out to one side will not justify the other in purposely running into him or attempting to pass at all hazards. The certain rule is a person who attempts to pass another going in the same direction must do so in the manner most convenient under the circumstances. If damage results in passing the passer-by must answer for the consequences, unless the other by his own carelessness brought disaster on himself.

7. Persons who walk on a highway have rights equal to those who drive or ride on horseback. Both classes are required to exercise prudence. A footman who undertakes to cross a street at a regular crossing has a just cause of complaint against a driver who recklessly drives into him. It is therefore the duty of both parties to move cautiously and carefully at crossings. A footman who attempted to cross a street in New York City in front of a rapidly moving vehicle was injured, yet failed to recover because the court declared he was negligent in attempting to cross the street at that place and time under the circumstances.

8. Children and infirm persons, as well as others, have a right to walk along or cross the street of a city. They have a right also to assume that carriages or horses will not be driven at an improper rate of speed. A driver, therefore, must take reasonable care not to injure such persons.

9. Again, persons often walk along the street carry-

ing tools and merchandise of a somewhat dangerous character. Not infrequently one is seen carrying a bundle of rods and, absorbed by the exciting scenes around him and forgetful of his dangerous bundle, pokes a rod into the eye of a passer-by. The poker is clearly answerable for his negligence whenever he was not observing under all the surrounding conditions due care.

10. A person who is transporting over a highway articles of an unusual character which are likely to frighten horses, must employ persons to give warning to travellers and, if need be, assist them in travelling.

11. Again, travelling at a dangerous rate of speed on crowded streets is, in most cities, forbidden. To violate such an ordinance is negligence. It is said that where no ordinance exists a person is justified in travelling at a lively rate, even in the streets of a city. The rate of speed should be proportioned to the danger. Therefore reckless and noisy driving, whereby other horses are frightened and run away, is an actionable injury.

12. There may be a criminal as well as a civil liability for injuries caused by fast and reckless driving. Thus, two persons raced on a highway, and one of them ran over and killed a footman; both were declared guilty of manslaughter, on the principle that if two persons incite each other to do an unlawful act resulting in death to another, both are guilty.

To drive a mile in four minutes has been declared unlawful, and one who while driving at that rate

collided with another driving at ordinary speed, and killed him, was declared guilty of murder in the second degree. Many cases of similar nature have happened, resulting in similar punishment of the offenders.

13. A highway traveller must keep his carriage and harness in good, roadworthy condition; as the old English law expresses the idea, he must have a good tackle, and is negligent if he does not.

Occasionally a harness or wheel will break. This is not negligence in itself, for it may be a pure accident which could not have been prevented by using reasonable care. In other words, a traveller is not an insurer of his harness or vehicle. Thompson thus expresses the rule: If damages are inflicted by reason of the breaking of a carriage or tackle of a traveller on a highway, the traveller or owner of the tackle or vehicle is liable only on the principle of want of ordinary care.[1] Elliott says that this is unquestionably the true rule, for only those who enjoy unusual privileges or undertake unusual things are considered as warranters or insurers, and a traveller simply exercises a right free and common to all when he drives along a road or street.

14. The running away of a horse on a highway is not conclusive negligence on the part of the driver; but if no explanation is given, negligence may be presumed. Sometimes a horse gets loose and runs away. His flight may be the result of negligence in hitching him, but it is said that to leave a horse unhitched on

[1] Thompson on Negligence, p. 381.

a highway is not negligence in itself, especially if the animal is watched by a competent person.

To leave a horse loose in a city street is negligence, whether the animal is vicious or not. If a horse runs away through the owner's negligence the owner will be liable to one who is injured thereby, provided the latter was not guilty of negligence on his own part. But injuries caused by a runaway horse will not make the owner liable unless he or his servant in some way were liable.

15. Not infrequently one's liability turns on the answer to the question, what was the proximate cause of the injury. Thus a team was left unhitched in the street, and in attempting to stop it, the runaway collided with another properly hitched. This caused the latter to run away and collide with a horse standing by the pavement and properly secured. The driver of the first team was liable to the owner of the horse against which the second team ran, as the injury was the natural, proximate result of the first driver's negligence.

16. Very often both drivers are at fault, and it is difficult to render exact justice between the offenders. Elliott[1] in his excellent work on the subject thus formulates the rule in cases of concurring negligence: "(1) If the plaintiff is without fault, and there is negligence on the part of the defendant and another independent person over whom the plaintiff has no control, both negligences partly directed causing the accident, the plaintiff may maintain an action for all

[1] Roads and Streets, § 845, p. 921.

the damages so caused him against either the defendant or the other wrong-doer. (2) If, in like case, the negligence is partly that of the defendant personally, and partly that of his servant, the plaintiff can maintain an action either against the defendant or his servant. (3) If the negligence is that of the defendant's servant, although the defendant may be free from personal negligence, the plaintiff can maintain an action against either. (4) If the negligence, although not of the defendant personally nor of his servant, consists of an act or omission of another, so done or omitted by the order, direction or authority of the defendant, the plaintiff can maintain an action either against the defendant or such third person. (5) Although the plaintiff, either in person or through his servant, has been guilty of negligence, if such negligence 'did not directly if partly caused the accident,' the plaintiff can maintain an action against the defendant who did cause it. (6) If the plaintiff is personally guilty of negligence which 'partly directly' caused the accident, he can maintain an action against anyone. (7) Notwithstanding the defendant or his servant may have been guilty of negligence, the plaintiff cannot, as a general rule, maintain an action, if by the exercise of reasonable care, he or his servant could have avoided the accident."

17. The above rule applies to the drivers of vehicles or to the owners. In another chapter we have considered the rules that apply to servants, but one other point remains for consideration. A person who is merely a passenger in a public or private conveyance,

exercising no control, is not responsible for the conduct of the driver. But if he knew that the driver was drunk or otherwise incompetent, it would be his duty to take such action to prevent an accident as the circumstances might require.

18. The opposite rule applies to a master driven by a servant. The story has been often told of Lord Abinger, whose coachman on one occasion drove him along a street in London at a rapid rate. Abinger fearing that his servant would run into something and well knowing the rule of liability, shouted out to him, "Drive into something cheap."

19. Travellers on foot or in carriage may stop a reasonable time by the wayside, but cannot interfere with the rights of others. On one occasion a traveller stopped, leaving his wife to watch the horse, which, becoming frightened by a Punch and Judy show, ran away. Nevertheless the owner of the other horse with which the runaway collided could not recover for the injury. A foot traveller may stop to tie his shoe or get a drink at a *fountain* without losing his right as a traveller.

This right must be used in a reasonable manner. In a city a coach or carriage cannot stop an unreasonable time to solicit passengers. A man cannot keep wagons constantly in front of his store in a manner seriously interfering with the use of the street by the travelling public. It is negligence to hitch a horse by the roadside in such a manner that the hind wheels of the carriage will extend into the beaten track.

20. Cattle may be driven, of course, along a high-

way, but this must be done in a reasonable and careful manner. There must be greater care in driving them through a city street than along a country road. Also in driving wild cattle, like those from the southwestern plains, than cattle more domesticated.

Should they escape while going along the highway and, through the driver's negligence injure someone or his property, the owner would be liable. On the other hand, if he were exercising proper care nothing could be recovered. Once a butcher bought an ox at a market and while the animal was going through the street it became excited, rushed into a china shop, and tried to hide among the crockery. Yet the hardly less excited butcher was not responsible for the damage wrought by this unexpected detour of the animal.

21. Travellers are not confined to the use of horses and ordinary carriages. How far they may avail themselves of new locomotion is an unsettled question. Elliott says that new and improved means must have been contemplated when the streets were laid out and fitted for public use. He thus states the rule: "When new means of locomotion come into general use among travellers on highways which is not dangerous when properly managed, and which does not seriously interfere with the proper use of the highway in other modes, we think it cannot be deemed unlawful in itself." The courts have gone so far as to hold that the use of a steam traction engine on a highway was not necessarily a nuisance.

In a recent case in Rhode Island the Supreme Court thus declared: "It cannot be doubted that the [owner

of a machine has] a right to transport it over the highway. Any person has a right to transport over it elephants and animals which may frighten horses, also loads of goods which from their height or appearance or the noise made in transporting them may frighten some horses. But a person who drives along a highway an object or animal which from its appearance or noise is likely to frighten horses should take the precaution of having persons to warn travellers of the danger and thus prevent injury." This seems a reasonable rule, and anyone who disregards it ought to pay for the ill consequences of his conduct.

22. Cycles of every kind are vehicles and subject to the law of vehicles so far as reasonably applicable. They have equal rights on the road with other vehicles, including cars running on tracks laid upon a highway, and the fact that a horse is unfamiliar with them and is frightened by their sight is not of itself evidence of negligence in their use. Cycles are subject to the general rule of the road as to keeping to the right or left, and in view of the light weight of the average cycle and the ease with which it can be guided, a cycle is bound to give way to a reasonable extent to heavier vehicles without insisting too strenuously upon a literal compliance with the rule on the part of such vehicles. But, until good reason appears to the contrary, a cyclist is entitled to assume that every approaching vehicle will conform to the law of the road. Cyclists are also bound to keep a reasonable vigilant watch for approaching vehi-

cles coming from any direction, even from behind, but as they cannot conveniently look behind them, they generally are only bound to listen and not to look. Having a right to ride in the center of a railroad track laid along a highway, a bicyclist is not at fault for not looking backward to see if a car is coming, although he is in fault if he neglects to get out of the way when sufficiently warned by a car going or similar signal.

The running of a cycle along a sidewalk is frequently prohibited by statute or local ordinances, sometimes with reasonable exceptions and sometimes absolutely. But even in the absence of a statutory regulation, it is presumptively improper to use a sidewalk for this purpose, and although the act may be justified by special circumstances, yet a foot passenger has always a superior right upon the sidewalk. Even in the main road, a cyclist is bound to keep vigilant watch for foot passengers, and since it is so easy to guide a cycle, especially a bicycle, while its approach is so noiseless, negligence upon the part of the cyclist is presumed in case of collision with a footman passenger by a cycle coming behind him when no warning has been given. The omission of a suitable brake or bell or lamp after dark is of course evidence of negligence when such a thing is required by the statute or ordinance; such omission is also some evidence of negligence in any case.

CHAPTER VI

AUTOMOBILES

1. What may be used on highways.
2. How the right may be limited.
3. Employment of chauffeur.
4. Degree of care required of chauffeurs.
   - *a.*—Safety of persons versus dogs.
   - *b.*—Unforseen emergency.
   - *c.*—Unavoidable accident.
   - *d.*—Driving on the wrong side.
   - *e.*—When a person with driver is negligent.
   - *f.*—When horn should be sounded.
5. Must avoid injuring persons on the street.
6. Driving at street intersections.
7. Liability of owner for chauffeur's negligence.
8. Owner not liable for driver out of his employ.
9. Carrying of gratuitous passenger.
10. Carrying for hire.
11. Owner not liable for intervening agency.
12. Duty of garage keeper.
13. Duty of hirer of automobile.
14. Lien of garage keeper.
15. Rights of purchasers.
16. Warranty of machine.
17. Remedy for broken warranty.
18. Duty to inspect machine.
19. Sunday contracts for hire.

1. One of the first questions after the introduction of automobiles was the right to use them on the public streets and highways. The law presumes that the public ways will be used by other and improved modes of locomotion than were in existence when they were laid out and dedicated to public use. Says the Supreme Court of Michigan:[1] "Persons making use of horses as means of travel, or traffic by the highways have no rights therein superior to those who make use of the ways in other modes. . . . Improved methods of locomotion are perfectly admissible if any shall be discovered, and they cannot be excluded from the existing public roads, provided their use is consistent with the present methods." And the Supreme Court of Indiana[2] has well said that "because automobiles are novel and unusual in appearance, and for that reason likely to frighten horses unaccustomed to seeing them, is no reason for prohibiting their use. In all human activities the law keeps up with the improvement and progress brought about by discovery and invention, and, in respect to highways, if the introduction of a new contrivance for transportation purposes, conducted with due care, is met with inconvenience and even incidental injury to those using ordinary modes, there can be no recovery, provided the contrivance is compatible with the general use and safety of the road."

2. The right to use automobiles on the highways is not an unqualified right. The rights of persons using other modes of locomotion must not thereby be

[1] Macomber v. Nichols, 34 Mich., 212.
[2] Indiana Springs Co. v. Brown, 74 N. E. Rep., 615.

impaired. A writer has thus expressed the limitations: "The right of one person to an unusual or peculiar use of a highway must be reasonably consistent with the right of all other persons in their use of such highways."

Statutes and municipal ordinances may limit travel by motors along the highways. Thus they may set aside some streets and forbid such travel on them, or to prescribed hours of the day.

Statutes in many states forbid minors from operating motors. Such regulations are proper and within the law-making power.

3. One who employs another to run a motor should exercise reasonable prudence in selecting a person having the necessary requirements. If the owner knowingly entrusts the machine to an incompetent person, he is responsible for the consequences.

4. The kind or degree of care required of chauffeurs or drivers is the most important, perhaps, of all the questions on this subject. The Supreme Court of New York has thus expressed the rule: "While the automobile is a lawful means of conveyance, and has equal rights upon the roads with the horse and carriage, its use cannot be lawfully countenanced unless accompanied with that degree of prudence in management and consideration for the rights of others which is consistent with safety."[1] Statutory laws almost everywhere regulate the speed, but even when the speed limit is strictly observed, the chauffeur does not always fulfil his duty by observing the speed limit.

[1] Knight v. Lanier, 69 App. Div., 454.

Something more is often required when passing a horse. The chauffeur must look at the animal, and if he discovers that it is restive or frightened, he must do his best to quiet it, instead of rushing on unmindful of the danger to horse and driver. This duty is so important as to justify its expression in judicial language: "As drivers are about to meet on the road, each owes to the other the reciprocal duty to conduct himself and conveyance in a manner to avoid placing the other in jeopardy. And when the defendant saw the plaintiff's horse had become frightened at the rapid approach of the strange, noisy carriage, and that plaintiff was in danger, it was the highest moral, as well as legal, duty of the defendant to stop and remove the plaintiff's peril rather than to increase it by rushing onward. . . . The law of the road does not tolerate any such inconsiderate and reckless disregard of the rights of other travellers on the highway."[1]

In a more recent case the Supreme Court of Kentucky has remarked: "While automobiles are a lawful means of conveyance, and have equal rights upon the public roads with horses and carriages, their use should be accompanied with that degree of prudence in management, and consideration for the rights of others which is consistent with their safety. If, as the jury have found by their verdict, appellee knew or could have known by the exercise of ordinary care, that the machine in his possession and under his control had so far excited appellant's horse as to render

[1] Indiana Springs Co. v. Brown, 74 N. E. Rep., 615.

him dangerous and unmanageable, it was his duty to have stopped his automobile and taken such other steps for appellant's safety as ordinary prudence might suggest." [1]

(*a*) A driver should prefer the safety of a human being to that of a dog. Hence a driver who changes his course to avoid a dog that has suddenly run into the street may be guilty of negligence in colliding with another vehicle.

(*b*) If some unforseen emergency occurs which naturally would overpower the judgment of an ordinarily careful driver, so that momentarily he is not capable of intelligent action, he may not be negligent. No one should drive an automobile amid the dangers likely to be encountered on modern highways who is not reasonably steady of nerve, quick in forming an opinion and calm in executing a design. Whether under circumstances of emergency the conduct of the operator of the vehicle measures up to the standard of reasonable care, is a question of fact to be decided in each case.

(*c*) An accident to a traveller which is occasioned by an automobile, when no negligence or wrongful act on the part of the owner or driver of the machine is shown, is regarded as an unavoidable accident for which no liabilities attach to owner or driver. Automobilists are not insurers. A driver is proceeding with due care along a street and a child suddenly darts in front of the machine, so close that, although using every means to avoid collision, he is unable to

[1] Shinkle v. McCullough, 116 Ky., 960.

prevent it. Collision with other vehicles may happen when neither party is negligent. In such cases the injury is regarded as an unavoidable accident.

(*d*) All travellers along a highway should comply, and expect compliance by others, of the rules of the road. When one violates these he becomes more dangerous to other travellers. Hence he must exercise more caution. Thus, a driver, who for any reason is going on the wrong side, must exercise more care than if he were driving on the other.

(*e*) When may the negligence of a driver be imputed to others riding with him? When they are riding together in the same enterprise. If, therefore, one is sitting beside the driver and sees danger not far away and says nothing about it, he is guilty of contributory negligence.

The statutes in many of the states prescribe the duties of a chauffeur when meeting horses on the highway. These generally require him to stop his machine when the driver of the other conveyance, by request or signal of some kind desires this to be done. A writer who has carefully studied the law says that where the chauffeur sees or knows, or by the exercise of ordinary care might know, that his automobile by reason of its unusual and peculiar construction, or by reason of the rate of speed at which it is driven, is frightening the horse or team of another using the highway, and that such horse or team will become unmanagable and is likely to injure the persons in the vehicle drawn by the horse or team, it is his duty to stop the automobile immediately and

give the other person reasonable time in which to extricate himself from any probable injury.

(*f*) It is perhaps an anomoly in one case to charge the driver of a motor vehicle with negligence in sounding his horn when approaching a horse-driven vehicle, and in another case to impute negligence to him if he fails to give a warning of his approach and his sudden appearance frightens the horse. Whether he should sound a signal, and when it should be done, depends upon what course of action is reasonable care under the circumstances. Although one may travel with a conveyance which is likely to frigten horses, yet, while doing so, he must exercise reasonable care to avoid injury to others lawfully using the highway. The fact that motor vehicles are novel and unusual in appearance and for that reason are likely to frighten horses, is no reason for prohibiting the use of such machines. It is, however, the duty of one operating a motor car to take all reasonable precautions against frightening horses or other domestic animals on the highway. But, if the driver of an automobile proceeds with due care and with a proper regard to the rights of other travellers having equal rights in the street, he is not liable for injuries occasioned by the frightening of a horse. The degree of care to be exercised by the driver of the automobile depends upon the circumstances of each particular case.

5. The chauffeur must observe the same rules when meeting individuals in the streets or highways. When he knows, or would have known by exercising a proper lookout, that a child or somewhat helpless per-

son is in a disadvantageous position and is in danger, the chauffeur must exercise more care in order to avoid injury. He must bring his machine within control. He is required to take notice that people will be at the usual crossing places in the streets, and they have a right to assume that he will act accordingly. On one occasion it was held to be his duty to respect the rights of a person who was standing in the road talking with another who was sitting in a carriage. Again, it has been decided that the chauffeur must know and respect the rights of a person to step from a street car into the street and seek to avoid a collision. In a well considered case a court has said: "No owner or operator of an automobile is therefore exempt from liability for collision in a public street by simply showing that at the time of the accident he did not run at a rate of speed exceedng the limit allowed by law or ordinance. On the contrary, he still remains bound to anticipate that he may meet persons at any point in a pubiic street, and he must keep a proper lookout for them, and keep his machine under such control as will enable him to avoid a collision with another person also using proper care and caution. If necessary, he shall slow up, and even stop. . . . The true test is, that he must use all the care and caution which a careful and prudent driver would have exercised under the same circumstances."[1]

6. It is the duty of one approaching the crossing of a street intersection to have his motor under control, and to observe what may be approaching on the other

[1] Thies v. Thomas, 77 N. Y. Supp., 296.

street. And if another motor is at the crossing it should be given an opportunity to pass, and thus avoid a collision. And in the same state it has been decided that if two motors approach each other at right angles at the intersection of two streets, and do not abate their speed, though seeing each other, until they are only a few feet apart, and then both sharply change their courses and one of them injures a pedestrian who was crossing, he may recover a joint judgment in the same suit against both drivers.[1]

7. With respect to the liability of the owner of a machine for the negligence of his chauffeur, the general rule governing master and servant applies. The following instruction to a jury has been approved by a court of review: "If the jury find either that the defendant left the automobile in charge of his son and coachman together to take it home, or in charge of the coachman alone, and the coachman neglected his duty in that regard, and allowed the son to run the machine, and by the negligence of the son the accident occurred, without contributory negligence on the plaintiff's part, then in either case the defendant is responsible and liable for that negligence and its consequences."[2] To make out a case, however, it must be shown that the defendant was the owner of the machine, and that the driver was employed by him.

8. There can be no liability when the relationship of master and servant does not exist. Consequently, the owner is not liable for an injury caused by a driver who is not in his employ. In one of the cases a son

[1] 68 Pa. Super. 316.
[2] Collard v. Beach, 81 App. Div., 582.

in his father's employ was given a holiday. Without his father's knowledge he took his father's automobile for a joy ride, which proved to be otherwise, for he operated the machine so unskilfully that he frightened a team of horses which ran away and injured the driver. Nevertheless, the father was not liable.[1] The principle covers a large class of accident cases in which automobiles are used without their owners' knowledge by other persons.

A chauffeur who takes an automobile without the owner's knowledge or consent, and uses it for his own purposes, does not render the owner liable for any injury on the theory that the chauffeur was not a competent operator, nor would the owner be liable if the machine was defective. More broadly, the owner's fault in employing an improper servant is not deemed the proximate cause of an injury occasioned to a third person when the servant has unlawfully taken the car for his own use.

9. One who carries a person gratuitously is under a less degree of responsibility than one who carries for hire. Says the highest court of Massachusetts: "Justice requires that the one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay." Yet as the court added: "There is an inherent difficulty in stating the measure of duty which is assumed in the two cases."[2] Nevertheless, a driver may be liable to such a passenger for negligence.

[1] Reynolds v. Buck, 127 Iowa, 601.
[2] 196 Mass. 183.

A gratuitous passenger, in whatever vehicle, is not expected ordinarily to give advice or direction as to its control and management. To do so might be harmful rather than helpful. But his presence in the vehicle may so obstruct the driver's view of a car or other approaching vehicle as to create the duty to look out for threatened or possible dangers, and to warn the driver of any discovery. This might be necessary for his own, as well as for the driver's, safety. On the other hand, the character of the vehicle in which he is a passenger, or his location therein, or other circumstances, may be such that to look or listen for approaching cars, or other dangers would be unnecessary and useless. It cannot be said, therefore, that in every case, and all the time, it is the duty for a gratuitous passenger to use his senses, or to look and listen in order to discover approaching vehicles or other dangers, or that his failure to do so would be a failure to exercise due care. But while this is so, the law fixes no different standard of duty for him than for the driver. Each is bound to use reasonable care, and what conduct on the passenger's part is necessary to comply with his duty, must depend upon all the circumstances.[1]

10. The relation of the owner of a motor or "jitney" carrying passengers for hire as between himself and his passengers is that of a common carrier. The formula of care that must be exercised by a carrier towards its passengers is "the highest degree of care." But, as between the driver of the machine and

[1] 83 Conn. 219, 223.

other travellers or railroad or street railway companies the precaution of the chauffeur is judged by the formula of "ordinary," or "reasonable care."

11. Again, if there be injury caused by an intervening agency, there can be no recovery. Thus, a chauffeur left his machine in the street while he went away to deliver a parcel. He turned off the power and set the brake. During his absence two boys took possession, started the machine and injured someone. The owner was not liable. In reviewing the case, a higher court declared it was not the duty of the chauffeur to chain the machine to a post, or secure it in such a way that a third person could not start it.[1] But when a statute requires a machine to be locked in a certain manner, the statute must be observed.

12. Turning from the automobile to those who make a business of keeping them for hire, or storing them for others, what are their rights and duties? A garage keeper is not a common carrier, but a private carrier, and must exercise the same care and skill that is applied to a person engaged in a special pursuit in which he serves others for a compensation. A garage is regarded as analogous to a stable, which usually is not a nuisance, though it may become one. If dangerous explosives are stored therein, and imperfectly guarded, such a garage would be a nuisance. On one occasion an action was brought to enjoin or restrain a garage keeper from storing gasolene in his building, which was located in the midst of houses.

[1] Burman v. Schultz, 84 N. Y. Supp., 292.

The building was a wooden structure, surrounded by others of similar character. The keeper had a permit from the city to store a barrel of gasolene in his garage. He kept six or more machines whose tanks usually contained gasolene. The court declared the place to be a nuisance, and ordered him to store the gasolene outside the building and to fill the automobile tanks outside, and to empty them before storing the machines. By so doing the danger was minimized to the point where, under the necessities of the case, the complainants were obliged to endure the remaining risk.

Berry says in his work on this subject: "If the keeping of explosives becomes a nuisance per se, the person so keeping them is liable for injuries caused by their explosion, regardless of the degree of care exercised in their keeping. But if their keeping is not a nuisance per se, then the lability of the person so keeping them for damages due to their explosion depends upon the want of care in the manner or place of keeping them, or some other negligent act. If the storing or keeping more than a certain amount of explosive substances is not contrary to some ordinance or statute, whether or not it is a nuisance depends upon its proximity to other buildings, the amount stored, and all other attending circumstances." [1]

Whether a restrictive agreement in a deed of land forbids the construction of a public or private garage depends of course on the language. As a garage

[1] § 203.

is not a nuisance a deed forbidding the maintenance of a nuisance will not bar a garage. But the maintenance of a public garage may be prevented by an agreement or covenant which forbids any "offensive" business.

13. One who hires an automobile must use reasonable care and skill in operating it. If he does not and injures it, he is liable for all injuries, whether they are caused by himself or by one who is operating the machine for him. The degree of care that he must exercise is the same as that of a man of ordinary prudence and discretion who is operating his own automobile.

The engagement of the hirer is to use the machine only for a particular use. If used in a different way, the owner may sue for the injury thereby caused, even though the hirer be a minor. Thus, says Berry, "if an automobile is hired for one purpose and is used for a different purpose, or if it is hired for a specified period of time, or for a specified journey, and the hirer uses it for a different purpose, or for a longer time, or on a different or longer journey, he is liable for all damages to the automobile arising while it was being used outside of or beyond the terms of the contract of hiring. But a slight immaterial departure from the course agreed upon will not render the hirer liable. Likewise, when he hires a vehicle to drive to and from a place without stopping, mere delay is not sufficient to render him liable."[1]

[1] On Automobiles, 751 (2d Ed.).

14. A garage keeper has no lien on an automobile for his keep charge. As such a lien depends on continuous possession, this would be destroyed the first time the owner made use of his machine. Doubtless it is within the legislative province to enact a statute giving him a lien, but it does not exist under a statute which provides that "a person who makes, alters, repairs, or in any way enhances the value of an article of personal property, at the request or with the consent of the owner, has a lien on such article, while lawfully in possession thereof, for his reasonable charges for the work done, and materials furnished, and may retain possession thereof until such charges are paid."

Again, statutes which give livery-stable keepers a lien for boarding or pasturing animals, or storing vehicles, do not apply to a garage keeper. But he may have a lien by express agreement, and if he takes an automobile to repair he has a lien thereon for a reasonable charge.

15. In purchasing an automobile the parties to the sale may make any agreement they choose not contrary to law. The vendor may warrant the machine, and if this be not fulfilled, the buyer has his rights of action against him. Thus an automobile was warranted for a year, but soon after its delivery it proved to be defective. After repeated attempts to repair it, which were not successful, the purchaser sent it to a garage and notified the seller that he had returned it. Refusing to return the money, the vendor was compelled by law to refund.

16. Berry says that in the absence of an express warranty, there is an implied warranty that it is of merchantable quality and reasonably fit for its intended use. "However, if one buys an automobile on sight after inspecting it and receives the same car that he purchased, there is no such implied warranty."

The law also clearly recognises a distinction between a mere representation and a warranty, which has been elsewhere stated. A warranty is a statement on which the purchaser relies. Thus, one bought an automobile which had been used, for about half the price of a new car. He was told that it had been run about five hundred miles and was in first-class condition and "all right." After using it two months, the crank shaft broke, damaging the engine. In an action to recover the purchase price, it was decided that the seller had not warranted the car; consequently the purchaser had no right to demand and recover his purchase money.

In another case a person bought a second-hand set of tires which had been run about two hundred and fifty miles. The salesman told the purchaser that "the tires were as good as new." Two months afterward one of the tires burst. The salesman's statement was held to be merely an expression of opinion, and not a statement of a present fact amounting to a warranty.

17. If the warranty is broken, the purchaser may employ one of several remedies. If he has paid for the machine and acquired the title, he may bring an

action to recover damages; if he has not paid for it, he may rescind the contract and refuse to accept the machine; or he may return it and notify the seller that it is subject to his order. In either case the buyer must act promptly. If he holds the machine beyond a reasonable time to examine and test it, his right to rescind is lost.

18. If the warranty be simply implied, the purchaser has a reasonable time for inspection. If he finds any defects, he must refuse to accept it, notify the seller that the warranty is not good, and return the machine. If he does not, he cannot set up any defects as a defense to the payment of the purchase money.

"But a failure to inspect constitutes a waiver of only such defects as were discoverable by a reasonable inspection, and not latent defects. And the purchaser is not bound unless he had an opportunity to inspect. Thus, where one purchased motors under an implied warranty and did not have an opportunity to inspect them, or did not discover defects on reasonable inspection, and they were useless, the seller could not recover the purchase price."[1]

If a second hand automobile is sold as fit for the purchaser's use in the grocery business, there is an implied warranty that it is reasonably suitable for that purpose.[2]

19. In many states contracts made on Sunday are void, though in some of them contracts possessing a necessitous or charitable nature are excepted. The

[1] Berry, § 817.
[2] Simmons Motor Co. v. Dudley, 196 Ill. App. 329.

hiring of an automobile for ordinary use does not come within the exception; though it comes within it if hired to obtain a needed physician, or perhaps attend a funeral.[1]

[1] Jones v. Belle Isle, 13 Ga. App. 437.

CHAPTER VII

FARM LAW

1. What goes with purchase of land.
2. What goes with house.
3. What is included in mortgage deed.
4. Rights of proprietors adjoining a highway therein.
   - *a.*—Shade trees.
   - *b.*—Herbage.
   - *c.*—Use of street for depositing building materials.
   - *d.*—Use of street for displaying goods.
   - *e.*—Abutter's rights against others who use highway.
5. Condemnation of land by railroad companies.
6. Reasons for preferring to purchase.
7. Railroad fencing.
   - *a.*—In many states company is required to fence.
   - *b.*—Kind of fence required.
   - *c.*—Gates.
   - *d.*—Period within which fence must be built.
   - *e.*—Liability for animals lawfully on track.
   - *f.*—Liability for animals on track through lack of proper fence.
   - *g.*—Liability for animals unlawfully on track.
   - *h.*—Liability for frightening horses, etc., in running trains.

8. Liability of railroad company for fires:
   a.—Must use proper means to prevent fires,
   b.—Its duty to extinguish them,
   c.—Land-owners are not required to guard against fires,
   d.—When company must guard specially against them,
   e.—Liability of company for fires beyond adjoining land,
   f.—Liability of company in some states by statute for all fires.
9. Fences between farms:
   a.—Triple object of them,
   b.—Stranger has no right on unfenced land of another,
   c.—Partition fences,
   d.—Duration of such a fence,
   e.—What action may be taken against the one who refuses to build,
   f.—Fence viewers must follow the law,
   g.—Until division no particular portion belongs to either owner,
   h.—After division is made liability of the one neglecting to build,
   i.—Bailee or keeper of cattle is liable for damage done by them,
   j.—What kind of division fence owner may erect,
   k.—Removal of partition fence.
10. What may be done with animals trespassing on one's land:

a.—May be impounded,
b.—Impounding ordinances must be reasonable,
c.—Notice of sale,
d.—Rights of non-resident,

11. Fence laws in South and Southwest:
a.—Reason for different rule,
b.—Cattle cannot stay on land of another against his consent.
12. Feeding on land enclosed in common.
13. Liability of owner of cattle for damage done to third owner of land by unlawfully going through land of second owner.
14. Law relating to dogs:
a.—When an unregistered dog can be killed,
b.—When killing of registered dog is proper,
c.—Dogs may be killed that chase or attack sheep.
15. Remedy for stealing or killing a cat.
16. Contract of employment.
17. Use of explosives, etc., in making excavations.
18. Removal of dangers, like an unsound tree.

Besides the legal principles contained in the previous chapters relating to the ownership and use of land, other matters will be here added to complete this part of our work.

1. At the outset let us try to define more clearly what goes with the land at the time of purchasing. Of course, the fences are included, and also fencing material that may happen to be piled up on the land at the time of its sale. Standing trees are also in-

cluded, those that have been blown or cut down, and are lying where they fell. But wood prepared for the market still belongs to the grantor of the conveyance.

Manure, also, whether lying in the barnyard or in a compact heap, passes with the farm.

2. There is greater difficulty in determining what passes to the purchaser with the house. A brick furnace goes with it, but the courts are not so unanimous in including portable furnaces. An ordinary stove with a pipe running into the chimney is excluded, while a range set in brickwork is not. Mantel-pieces that cannot be removed without marring the plastering are included, while those resting on brackets can be taken away. The subject of gas fixtures has long puzzled the courts.

The Supreme Court of Pennsylvania more than sixty years ago decided that gas fixtures and chandeliers were personal property and did not pass by the sale of land to the purchaser. The court founded its rule on the older rule or usage. "There is really nothing to distinguish this new apparatus from the old lamps, candlesticks and chandeliers, which have always been considered as personal chattels. Gas stoves are largely used for bath and other rooms, and are necessarily connected with the gas pipes in the same way, but no one would think of saying that they were fixtures which it would be waste to remove. It is therefore more simple to consider all these gas fixtures, whether stoves, chandeliers, hall and entry lamps, drop lights or table lamps, as governed by the same rule as the article for which they

were substituted."[1] And this rule has ever since been maintained in that and in other states. In Missouri the gas fixtures in a church did not pass by its sale by virtue of the same principle.

This rule does not prevail everywhere, and its weakness is clearly shown, we think, in the following utterances of an English judge. "The gaseliers are a part of the gas pipes, and, to use a legal expression, they take their nature, and are included in the fixtures, which go with the house under the lease. They are as much a part of the gas pipes as the mill stones are part of the mill. Although the gaseliers may be unscrewed and taken off without injuring the freehold, they are necessary to the enjoyment of the gas pipes which are of no practical use when separated from them."[2] This rule has been followed by a larger number of courts than the other; does it not rest on a sounder reason?

Pumps, sinks, water pipes, and all other fixtures attached to them for supplying water also pass with the deed, for they are as needful to enjoy the land as the land itself. To these rules may be added others stated by a careful writer: "If the farmer has iron kettles set in brickwork, near his barn, for cooking food for his stock, or other similar uses, the deed of his farm covers them also, as likewise a bell attached to his barn, to call his men to dinner. A cider mill goes with the apple orchard, and not with last year's crop of apples. If he has a cattle barn on the premises the tie-up planks, stanchion-timbers, tie-

[1] Vaughen v. Haldeman, 33 Pa., 522.
[2] See 17 Am. Decisions, 686-696.

chains, and hinge hooks used for fastening the animals in their stalls belong to the barn, and not to the cattle. If the farmer indulges in ornamental statutes, vases, etc., permanently erected, and resting on the ground by their own weight merely, and sells his estate without reservation, these things go with the land. But even this might not be so, if the article had just arrived and never been placed or fitted to its position on the lawn."

Other matters which have come within judicial inquiry and are held to pass with the land conveyed are the following:

A bar fastened by nails and screws to the wall and floor of a saloon, bookcases forming also the washboard around the floor: a hat rack built into the room; cisterns supplying the house with water, whether outside the house or in the cellar; cooking coppers, washtubs and water tubs, curbing enclosing a burial lot and a stone monument, a large hotel desk fastened to the floor; an electric annunciator attached to the wall, a hotel sign attached to a post on the sidewalk, in front of a hotel; ice in an icehouse standing on sold premises; an organ in a church; partitions in a store; paintings on canvas cemented to the ceiling, platform scales resting on a permanent foundation; a tramway in a quarry.

The following things are not included in such a conveyance: Carpets and curtain rods; movable china-closets and movable screens; a cooking range fastened to the floor of a hotel; counters; meat racks; an ice-box used in a grocery and meat shop; a safe in a bank

though bricked up; a weather vane with the owner's name attached to the roof of a house; marble slabs on brackets but not screwed to them; a playhouse built of boards picked up and nailed together by several children, including those of the vendor, stuffed birds attached to movable metal trays in cases fastened to the walls of a private museum.[1]

3. The same writer has added that in mortgage deeds there is one important difference "that any additions for permanent improvements upon the land after the mortgage is given, belong to the land, and go with it, so that if the farmer, after mortgaging his farm, erects a new barn, or other outbuildings, but fails to pay the mortgage debt, and the mortgagee forecloses, the owner will lose the whole, new and old, though it be twice the value of the whole mortgage debt."

4. Elsewhere we have described the rights of those who use a highway as a means of going from one place to another. But the adjoining proprietors have other rights that are peculiar and important. They have a right to the land itself subject only to the right of passage and repair by the public, and this right is often of no little worth. Such a proprietor may sink a drain below the surface, may carry water in pipes across or along the way, or mine minerals underneath. In perhaps the larger number of states the trees belong to him unless needed for repair of the way. A curious case is reported of a woman who, under the direction of the highway surveyor, cut the grass growing in a highway in order that her children might be able to

[1] These examples are taken from Vol. 13, American and English Encyclopedia of Law, 667, 668.

go to school without wetting their feet. Thus far she was guilty of no wrong, but, after cutting the grass, she carried it away and gave it to her husband's horse, which ate thereof. The second act was a trespass, and still worse, it related back and included her entire conduct.

(*a*) In Maine an adjoining owner may plant shade or ornamental trees within the highway, provided the public is not thereby impaired, and a highway surveyor who should destroy them would be a trespasser.

A row of trees planted near a boundary line is not a nuisance to the adjoining proprietor merely because it renders his land unfit for an unused purpose. Nor does the projecting of their trunks a few inches on the land of the adjoining proprietor, though not far enough to prevent him from plowing and cultivating it as near the line as he could otherwise, create a nuisance.[1] But an owner may enjoin an adjoining owner from planting trees like willows near the boundary line which, by spreading their roots into and branches over another's land, would be to him a serious injury.[2]

(*b*) Whether the adjoining owner is entitled to the herbage growing in the highway is a question not easily answered. In some states there are statutes empowering local boards to permit cattle to run at large on public highways. It would seem, says Elliott, that if the herbage belongs to the owner of the land "it cannot be taken from him either wholly or in part without compensation," but the courts do not think

[1] Grandon v. Olson, 78 Cal., 611.
[2] Brock v. Conn. and Passumpsic R. Co., 35 Vt., 372.

alike on this question. One of them has declared that "the owner of the soil is not deprived of the pasturage any more than he is of the way. He can enjoy both in common with his neighbours." The Supreme Court of Connecticut maintains a different view, which is approved by the leading author on this subject. "The right on the part of the public to depasture the land is not necessary for the exercise of their right to pass over it, and the exercise of such a right on the part of the owner is not inconsistent with the public right; the land is not, therefore, sequestered for that purpose when it is laid out as a highway, and no damages are given to the owner for the loss of any such right. On a careful consideration of the subject we are fully satisfied that the granting or authorising such a license, no compensation having been in any manner provided for the owner of the land upon which it is to be exercised, is beyond the constitutional power of the legislature. It constitutes the taking of the property of one person for the use, either of another, or of the public. If of the former it cannot be done, either with or without compensation; if of the latter it may be done, but only on providing compensation." [1]

(*c*) Another right belonging to abutters is the use of a street in front of their premises for depositing building materials, and for loading and unloading merchandise. This temporary use of a street is justified by necessity. The primary purpose of streets, so the highest court of New York has remarked, is for

[1] Woodruff v. Neal, 28 Conn., 165.

travel and transportation, and any interference with this is deemed a public nuisance. But like so many rules this also has an exception. "An abutting owner engaged in building may temporarily encroach upon the street by the deposit of building materials. A tradesman may convey goods through the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers; and the use of a street for public travel may be temporarily interfered with in a variety of other ways without creation of what in the law is deemed a nuisance."[1]

Such a use by an abutter must be temporary and reasonable—a question of fact—a justifiable use by one proprietor may furnish no justification for a longer or larger use by another. An eminent English judge once remarked that an abutter "is not to eke out the inconvenience of his own premises by taking the public highway into his timber yard."

(*d*) Some other applications of this rule have been stated by Elliott that may be added. "No one has a right to appropriate a portion of a street to his exclusive use in displaying his goods or carrying on his business, even though enough space be left for the passage of the public. Nor has a tradesman any right to so conduct his business as to collect a crowd of people in front of his store to such an extent as to interfere with public travel. And the owner of land over which a highway is laid out has no right to obstruct it merely because he has not been paid for the

[1] Elliott on Roads and Streets, § 694, p. 848.

land; nor because he has opened a new road, although the latter may be as convenient for the public as the old way."

(*e*) Lastly, an abutter has all the ordinary remedies of a land-owner against one who makes any use of a highway outside or beyond the public use of it. Thus, he can maintain an action of trespass against anyone who unlawfully cuts and carries away his grass or trees, or who, standing on the sidewalk in front of his premises, abuses him and refuses to depart. An abutter may, by a proper action, compel a railroad company to remove its track which has been placed on the highway without paying him damages therefor. It has the same right to proceed against an individual who has unlawfully encroached thereon.

No man has a right to deposit his carts or merchandise in front of another's premises. Should the wrongdoer neglect to remove them after receiving notice to do so, the other can remove them to a suitable place. An owner of a drove of cattle who stops to feed in front of another's land is as responsible as if he turned them into the owner's field. Says another: "No person's children have a legal right to pick up apples under your trees, although the same stand wholly outside of the fence. No private person has a right to cut or lop off the limb of your trees in order to move his barn or other buildings along the highway; and even if the owner of the building has a license from the proper authorities to move the same through the streets, this does not exempt him from liability to private sufferers. And no traveller can

hitch his horse to your trees on the sidewalk, without being liable if it gnaws the bark or otherwise injures them, and you may untie the horse, and remove him to some safe place. If your well stands partly on your land, and partly outside the fence, no neighbour can use it, except by your permission. Nay, more; no one has a right to stand in front of your land and whittle or deface your fence, throw stones at your dog, or insult you with abusive language, without being liable to you for trespassing on your land; he has a right to pass and repass in an orderly and becoming manner—a right to use the road, but not to abuse it."[1]

5. Farms are often invaded by railway companies. Great civilisers, nevertheless their coming has often been very unwelcome, especially when coming too near the farmer's door, disturbing his animals by day and himself still more by night.

Railroad companies either purchase the right to use the land for making a track, or purchase the entire title, thus becoming absolute owners. Whenever they fail in their negotiations for the use or sale of it, then they can take as much as may be needed by virtue of authority granted by the state. No state would permit a railroad company to do this if it were not regarded in a very real sense as a public corporation, obliged to transport passengers and merchandise at reasonable times and rates. Formerly, proceedings for taking land were more common than they are at present.

[1] Bennett's Farm Law, p. 34.

6. Companies now seek, as far as possible, to purchase the use, or the land outright, rather than resort to the legal methods of condemnation. One reason for adopting this course is, the juries who determine the value of the land taken generally have a strong regard for the farmer, and award high damages. Railroad companies therefore know from costly experience that to buy is cheaper than to condemn. Of course, in purchasing, the parties may make any agreement they please, within legal limits, concerning the use of the land that is to be taken.

7. The fencing of the land acquired by a railroad company is an important matter and is often the subject of agreement.

(*a*) By statute the railroads in many states are required to maintain fences along their ways; in others no fences are required, but the companies are responsible for all injuries done to cattle through their ignorance of the hot and powerful nature of a locomotive. Doubtless a time will soon come when kindness to beast and economy in management will unite in erecting proper barriers against these invasions.

(*b*) If no special kind of fence is prescribed by statute, any kind that is reasonably sufficient will suffice. The usage of a locality is important. A barbed-wire fence may be sufficient, and has indeed come into general use. When thus used by the consent of law or usage a company will not be liable if cattle, frightened by the noise of a train, run into it and suffer injury.

If the company has specially agreed with an adjoining proprietor to maintain a sufficient fence, and through its failure to observe the agreement, an animal is killed, he can recover for the loss. Again, such an agreement or covenant runs with the land benefited and against the land charged, as respects subsequent grantees.

(*c*) "When there is a gate in a railroad fence," says Baldwin, "made and maintained for the use and convenience of an adjoining proprietor, the duty of keeping it closed rests on him, and may be enforced if need be by an injunction. If his cattle wander through and are killed, it is for him to show how it was left open, and if it appears that some stranger opened it, he cannot recover without showing that the company knew, or ought to have known, that it was open, and had time and opportunity to have it closed." [1]

(*d*) Again, the statutes sometimes specify the time within which fences must be built. If no statutes on the subject exist they must be built as soon as they are needed to give the required protection.

(*e*) Some questions still remain concerning animals that attempt the dangerous feat, either of walking the tracks, or walking along or across it, the latter experiment often proving just as difficult and fatal as the former. When they are lawfully on the track, as they may be, for example, at crossings or at other places where a fence cannot be possibly maintained, trains should be run with reasonable care to avoid

[1] American Railroad Law, Chap. XVII., § 4, p. 151.

collision with them. But the law is clear that this duty is inferior to that of saving the lives of passengers. Consequently, to lessen the danger to them, a train, when approaching a herd of cattle on the track, if it cannot be stopped before reaching them, may be rushed at still greater speed, though with the sure result of a greater loss of animal life.

(*f*) If an animal strays on the track by reason of the company's neglect in not building a fence required by contract or statute, even though due care was used in running the train, and is killed or injured, the company is liable. Whether the owner could recover if when turning his animal out to pasture he knew that the fence was defective or wanting, often depends on the statute regulating the matter.

If a company has built a proper fence that has since become defective, the ordinary principles governing the relations of adjoining proprietors at common law apply. To turn cattle out into a pasture adjoining a railroad, immediately after a severe storm which has prostrated fences in many places, without first looking to see if the railroad fence was in good condition, might be inexcusable negligence.

A different rule applies to a non-adjoining proprietor. If his cattle stray into the land of an adjoining proprietor, and through this upon the railroad, the owner has no cause of action against the company.

(*g*) If cattle without any right go upon a railroad track properly fenced the company performs its whole duty in using ordinary care, after they are seen, to avoid running them down. So much care the com-

pany must exercise, even though the owner was negligent in not looking after his cattle. Again, it is said that if the way is unfenced and none is by law required, "the train hands, in passing through territory much used for pasturage, should be on the lookout for cattle on the track; for it would then be natural to look for them occasionally to stray in that direction." In Alabama the highest court has declared that a railroad company, which runs its trains in the night time at such a rapid rate of speed that it is impossible by the use of ordinary means to stop the train and prevent injury within the distance in which the cattle could be seen by the aid of a headlight, is negligent.[1]

Cattle are rarely on a railroad lawfully except at a crossing. In approaching this a train must be run with ordinary care to prevent injury. A signal should also be given, as the attention of animals is attracted by noises. A failure to give signals by bell and whistle in many states is declared by statute to be negligence. This rule though does not apply to cattle that have strayed away from their owners and are on the track as trespassers. A mule that once forsook its owner and strayed on the track was killed. The owner tried to recover on the ground that the engineer neglected to ring the bell and blow the whistle. But the court said that "if it was the duty of the engineer to blow the whistle as notice to the mule, I do not see why the mule should not be held to the rule, to 'stop, look, and listen.'"[2] The owner, therefore, was as

[1] Louisville & Nashville R. v. Kelton, 112 Ala., 533.
[2] Fisher v. Pennsylvania Co., 126 Pa., 293.

helpless in law as his mule was before the engine that took his life.

(*h*) Lastly, to run trains under the most favourable conditions is risky, and animals are constantly frightened, especially by the whistle and by the general movement of the train. Horses are frightened by the passage of a train over or beneath them. The most frightful accidents occur in this manner, yet rarely can any damage be recovered of the company. It is simply doing what the law authorises. "If, however, such noises are unnecessarily and unexpectedly made, in such a way as to frighten horses lawfully on the railroad premises, their owner may be entitled to recover.[1]

8. Another subject hardly less important to farmers who live along a railroad is the question, who shall suffer for the loss caused by the sparks emitted by a locomotive? the railroad or the land-owner? A railroad is not liable for fires caused by locomotives unless there was something wrong in the mode of its construction or operation. As a locomotive properly equipped and run does not ordinarily cause fire, if it is caused in that manner, both by statute and by common law, the fire is regarded as the result of the company's negligence. "It is almost necessary for the attainment of practical justice that such a presumption should be made. The condition of the locomotive and the mode of its operation will naturally be best known by the company, and probably known by it only." Of course, the company can overcome the presumption by clear and satisfactory evidence. To that end it may show

[1] Baldwin, Chap. XLIII., II, p. 434.

that an engine, which is presumed to have caused the fire, was equipped with the proper fire screens and carefully operated by a competent engineer. On the other hand, the farmer may show the quality, size and character of the sparks thrown out from the locomotive, and may also "prove by expert testimony that such sparks would not be thrown out from a proper engine in proper repair."[1]

(*a*) The company is bound to use the best means, spark arresters or other contrivances in common use to prevent fires. Though not required to adopt the latest most effective invention, the company is chargeable with negligence if it does not procure those which have been thoroughly tested in practice and found the best. Statutes sometimes exist requiring the use of some particular safeguard, and if they appear to have intended to prescribe the only precaution to be taken, no other need be.

(*b*) Again, a company, though not negligent in starting a fire, may nevertheless be responsible for not putting it out. It is not "absolutely bound" to stop a freight or passenger train for this purpose, but there are occasions when such action is needful. The courts have differed on this question. The Supreme Court of Missouri denies the responsibility of a railroad to act in the way of putting out or preventing the fire from spreading. Its reasoning is interesting, for it applies more widely than to a railroad company. "If a fire should originate on A's premises through no fault of his, and should extend to B's and consume his property,

[1] Baldwin, Chap. XLIV., § 2, p. 438.

A, if not liable for the occurrence of the fire, would not be liable on the ground that carpenters whom he had employed in repairing a building on his premises or labouring men whom he had employed to dig a ditch through his farm had neglected to extinguish it. If not liable for the origin of the fire he cannot be held so on account of the neglect of a social duty by persons in his employment in a business not connected with the origin of the fire, or imposing any duty to extinguish it in addition to that which every citizen owes to society."[1] But other courts perceive that on such occasions railroad companies have a clear duty to perform that should not be lightly disregarded. "There is no hardship," says the Supreme Court of Texas,[2] "in requiring them not only to use a high degree of care to prevent the kindling of fires, but to extinguish them when they have their origin in the conduct of the company's business if this can be done by the exercise of ordinary care." The court further adds a principle of more general application:

"Every person has the right to kindle a fire on his own land and for any lawful purpose, and if he uses reasonable care to prevent its spreading and doing injury to the property of others no just cause of complaint can arise; yet although the time may be suitable and the manner prudent, if he is guilty of neglect in taking care of it and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done."

(*c*) Land-owners along the line are not required to

[1] Kinney v. Hannibal & St. Joseph R., 70 Mo., 243, 257.
[2] Missouri Pacific R. v. Platzer, 73 Tex., 117, 122.

adopt special means to guard against fires that may be set by locomotives, nor to refrain from using their premises in the ways common among society. For example, they are not required to use metallic instead of shingle roofs, nor to maintain a fire apparatus.

(*d*) On the other hand, railroads may be negligent in not having a watch kept at a point of special danger; for example, at wooden bridges, which may easily be set on fire by a train and spread, thereby causing the destruction of other buildings. Again, if buildings thus exposed are erected by lease or license on land belonging to a railroad company, it may stipulate against loss caused by fire from any locomotive of the company.

(*e*) The company may be liable, not only for injury to land adjoining its own, but to other land perhaps far away, if the fire had a negligent origin, or if this character is given to it by statute. One who starts a conflagration is responsible for all its consequences. "If," says Justice Baldwin, "he starts it on a windy day, or in a windy season, when the fire is exposed to a wind blowing in a certain direction, he has some reason to anticipate that the flames or sparks may be carried that way. In such cases it is for the jury to determine whether the plaintiff's injury was the natural consequence of the defendant's act. The company may be liable for damages done many miles from the railroad."

(*f*) By statute railroads in many states are made liable for all fires set by their engines, regardless of their non-negligence. Wherever this liability prevails

they have an insurable interest in all property near their line. Its responsibility for losses is commensurate with its power to insure itself against them. On goods temporarily and transiently found along its line it may not be able to procure insurance. Such a statute, making a railroad company an insurer against fires set by its engines, does not give an action to owners of goods in its own hands, as a warehouseman, which are thus burned. Their rights we have considered elsewhere.

9. Leaving the questions that concern more especially farmers who live near railroads, resulting from their creation, we will consider some questions that concern farmers everywhere. One of these is the building and maintaining of fences.

(*a*) A fence serves a triple purpose—to mark a boundary, to restrain one's animals from going astray, to prevent the intrusion of animals belonging to others. While no one by the common law is obliged to maintain a fence for the latter purpose, he is required to keep his cattle either by means of fences or by watching them from intruding on his neighbour. Says Blackstone: "Every man's land is, in the eye of the law, enclosed and set about from his neighbours; and that either by a visible and material fence, as one field is divided from another by a hedge, or by one ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field."

If, therefore, one's cattle enter the land of another, the entry is a trespass, the owner is liable, nor will

any degree of prudence excuse his act. This rule is so far modified that the owner of cattle which go astray while he is driving them along an unfenced highway is not liable if he regains them with reasonable promptness.

(*b*) A person has no right to drive his cattle over the land of another simply because it is not fenced. On the other hand, if animals enter the land of another, whether it is fenced or not, the latter, of course, may turn them back, but in doing so he can use only ordinary means, such as a prudent man would employ. He must not in his wrath inflict needless injury on them. And if he neglects this simple rule, whatever may have been the provocation, he cannot escape paying for his conduct. What a quietus would be wrought by the enforcement of an effective method of collecting a penalty in advance of the impending outburst!

(*c*) To prevent these things fences have been erected in the older and better settled parts of the United States, and the obligation to build and maintain them is often statutory, but the obligation may also be created by agreement and prescription. The statutes, however, apply more especially to partition fences.

The building and maintenance of partition fences may be done by agreement between the respective owners, or by statute. But the requirement should not be overlooked that an agreement for building and maintaining such a fence is in many states, though not in all, within the statute of frauds, and therefore to be effective must be in writing.

The statutes providing for partition fences cannot

be easily described, as they vary so greatly in the different states. Some of them, however, may be set forth possessing a general nature. They must be built upon the line between the adjoining owners, and, if more than half is built on the land of one without his consent, he may remove the excess, even though in so doing he removes the entire fence. Worm fences also come within this rule, the centre of the rails being regarded the dividing line between the adjoining lands. A partition fence between the lands of adjoining owners is presumed to be the common property of both. If originally built on the land of one of them it is his; but if built on the land of both, and at their joint expense, each is the entire owner of the part on his land.[1]

The statutory division is made by fence viewers who act on the application of one or both parties.

In some states these officers constitute a permanent tribunal; in others they serve for only one occasion. The office is in its nature judicial. Says the Supreme Court of Iowa, in construing the statutes of that state on the subject: "Their jurisdiction is limited to matter involving the obligation of adjoining owners to erect and maintain partition fences; the assignment to each his share of the fence to be built and maintained; the prescribing of time within which it shall be built, and in case of failure to build, and the building by the other party, the ascertaining and certifying of the value of the fence."[2] In other states the function of fence viewers is essentially similar.

[1] Quillen v. Betts, 1 Penn., 53.
[2] Peschongs v. Mueller, 50 Iowa, 237, 238.

(*d*) How long is the division thus made binding between the adjoining proprietors? As long as the lands continue to be co-terminous and no changes arise to disturb the equality of the division. When, therefore, there is a change in the ownership of a portion of the land, there may be a new partition.

(*e*) On default of one adjoining owner to build and maintain the portion of the fence assigned to him by the fence viewers, the other party may build the entire fence and receive the value of the portion of the party in default, such value to be determined by the fence viewers. In some of the states twice the amount of the cost of the portion thus built for the one refusing to build may be recovered. Furthermore, the fence viewers, when requested, may determine the sufficiency and value of the fence as a preliminary to recovering the amount of the delinquent.

(*f*) If fence viewers fail to comply with the statutes defining their authority their proceedings are void; otherwise they are final unless they have been guilty of fraud or have made a mistake. They cannot determine a fence to be partition fence which is not. They have no authority whatever to so establish division lines.

(*g*) Until there has been a division by agreement or by action of the fence viewers, no particular portion belongs to either owner. "Each party," says the Supreme Court of Massachusetts, "is equally bound to move in the matter; and until such division there can be no deficiency or neglect alleged as to the fence of either party, separately and individually. If either

therefore, puts cattle on his own land and they enter upon the land of the adjacent proprietor, there being no partition of the fence separating the lots, he will be liable to an action of trespass therefor." [1]

(*h*) After the partition has been effected, the one who neglects to build his portion is liable for the injury done by his cattle on the land of his neighbour. On the other hand, the delinquent is without a remedy for the injury done by his neighbour's cattle that take advantage of the situation to invade his grounds. Says the court in a well-considered case: "After the fence has been divided the owner of a close can sustain no action for damages done by horses or cattle breaking into his close, through defect in the fence which he was bound to make and repair, if they were rightfully on the adjoining land." [2]

(*i*) Sometimes cattle are fed on the land of another for a stipulated compensation. This is called agistment.[3] Before the owner can lawfully obtain them he must pay to the agistor the amount due for their feed and care. The keeper, however, has no lien on them for his services except by special agreement. An action will not lie against the owner of cattle for injuries done by them while they are in the agistor's possession. "He is the qualified or special owner. He stands in the place of the owner for the purpose specified, and the trespasses of the cattle are his trespasses." [4] But if the owner were to select a known

[1] Thayer v. Arnold, 4 Met., 589. For forms relating to division fences see Vol. VI, Appendix, No. 7.
[2] Laurence v. Combs, 37 N. H., 335.
[3] For form of agreement see Vol. VI, Appendix, No. 27.
[4] Rossell v. Cottom, 31 Pa., 528.

reckless and irresponsible agistor, and the cattle while in his possesion would be likely to commit injuries, the owner would be responsible for them.[1]

A bailee to whom animals are bailed for pasturing, unless there be a contract to the contrary, is liable for their escape and loss through his neglect.

(*j*) An adjoining owner may erect a division fence as high and close as he pleases, nor can the opposite owner object to the use of the materials used, nor to the obstruction thereby caused to his view and light.[2] In a rcent case the Supreme Court of Indiana thus remarked: "The fact that the division fence erected by A was close and high, and made of rough and unsightly materials, and that it cut off the view from B's lot, and shaded and thereby injured her garden, did not render the fence a private nuisance, nor entitle B to have A abated. A had the right to build a partition fence, a house, or any other structure on his premises, and along the entire length of the line dividing them from the real estate owned by B. The latter had no easement of light, air, or view in or over A's lot, and she had no legal cause for complaint if these were interfered with or entirely shut off by the erection of a fence, house, or other building. A had the right to use his premises, and every part of

[1] Ward v. Brown, 64 Ill., 307.

[2] Abutting lot owners on city streets have a right to light and air which cannot be taken away from them under any conditions. "The abutting lot holder has the right to the light and air which the highway affords. To deprive him of this right would be to impair, or, it might be, to destroy the comfort, enjoyment, or use, to be deprived from the easement to which he is entitled." Townsend v. Epstein, 93 Md., 537. "Lot owners have a peculiar interest in the adjacent street, viz., easements of access, light, and air, which are property rights, and as such are as inviolable as the property in the lots themselves." Dillon on Municipal Corporations, § 712 (4th Edition).

them, for any lawful purpose which did not deprive the adjacent owner of any right of enjoyment of her property recognised and protected by law. The erection and maintenance of a division fence thereon was a lawful use of A's land and no legal right of B was violated or invaded thereby. A's motives in putting up and maintaining the division fence were unimportant. He had a legal right to construct and keep up the fence, and having such right, his motives in asserting and exercising it did not impair or destroy the right."[1]

(*k*) Another point should be added concerning the removal of partition fences. Such a fence built wholly on one's land is his property and, unless the statute prescribes a different rule, the other cannot maintain trespass for its removal. Nevertheless he has a remedy for injuries arising from its removal if the owner was bound to maintain it for the other's benefit. But a different rule applies to a pasture fence built on the line between adjoining lands. This is the common property of both, and either may maintain an action for its removal or destruction by the other. On one occasion one of the owners of such a fence set back his half fourteen feet on his land, and the other sued him and recovered damages. The remover, so the court remarked, acted on his supposed ownership of the materials. This was a slender foundation for the right claimed—"to remove a structure dedicated to important uses, the subject of legal duty and legal protection, a barrier erected as a landmark of boundary,

[1] Giller v. West, 162 Ind., 20, citing many cases.

a partition of property, and a means of preserving the fence of society." [1]

10. When the animals of a neighbour are in one's land he may pursue one of three courses with respect to them. He may impound them, or sue the owner for damages, or turn them into the highway and thus give them another chance to return into his own land, or into the land of another. The last is the easiest method, leaving one's feelings out of account, the first is perhaps more effective.[2]

(*a*) The right to retain animals running at large in the highways and other public places is regulated largely by statute. But the right extends further, to the impounding of animals trespassing on one's premises. It is said that "the mere trespass of animals will not justify their seizure and detention. Moreover, the strict construction put upon the right of distress requires that the taking must be before the trespassing animals leave the premises."

The statutes provide that the animals be advertised with an accurate description of them. A person who takes up an estray and fails to advertise it as the law requires cannot acquire the right to it through time and possession. Before the taker-up is required to deliver the animal the owner must prove his property before a proper officer and procure an order from him requiring the taker-up to deliver the animal to the owner. The owner should also tender the fees for posting and keeping the animal before receiving it; indeed the keeper has a lien on the animal

[1] Stoner v. Hunsicker, 47 Pa., 514.
[2] For notice to owners of strays see Vol. VI, Appendix, No. 6.

for these charges. Their amount is usually regulated by statute.

A person who takes up an estray and complies with the requirements of the statute becomes a bailee or keeper during the time he is required to keep it. He is vested with a qualified property which becomes absolute on failure of the owner to appear and prove his property within the time prescribed. The statutes, however, are construed strictly against the party claiming the benefit, and he must follow their provision closely.[1]

(*b*) The power of towns and other public bodies to enact ordinances providing for the taking up and impounding of animals running at large is unquestioned, as such ordinances partake of a penal character. The ordinances must be reasonable and be strictly construed in favour of the owner of property thus taken. In one of the latter cases the court said: "To seize and sell, upon necessarily short notice, animals of great value, because permitted by the owner to run at large in the streets, without an adjudication of the offense in the courts, seems to be a harsh remedy. But how this summary mode of proceeding can be avoided without surrendering the whole police power to protect the public highways from such an encroachment which destroys their use by the public for the time being, we fail to perceive. The owner will not restrain his own animals from running upon the streets. The city authorities must do so, and at once. Then such animals must be fed, cared for and kept until the owner pays

[1] 2 Cyc., 362.

the expense and takes them away. If he fails or refuses to do so they must be sold."

(*c*) Notice of the sale of the impounded animals by public authority is needful. An ordinance providing for their sale without this would be unconstitutional. The notice need not be personal; it is sufficient if posted or published in such a way that it will probably reach the interested party.

(*d*) Lastly, a non-resident is not exempt from the operation of an impounding ordinance, because it relates rather to property than to persons. If it is related strictly to the latter it would be inoperative, because an ordinance cannot have any force beyond the limits of the issuing power.

11. As we have seen, every man is obliged to confine his cattle to his own land, and if he neglects his duty he is liable for any trespass they commit on the land of another. But in the South and Far West the opposite rule prevails: cattle must be fenced out, and a stock owner is not liable because he permits his cattle to range over unenclosed land not belonging to himself. In permitting them to thus range at will he is not guilty of negligence. Such land is in a sense regarded as a common, or "range." Nor is its state of cultivation important.

(*a*) The reason for this radical change in the rule has been given by Justice Brown in expounding the fence law of Texas. "There are, or were, in the state of Texas, as well as in the newer states of the West generally, vast areas of land over which, so long as the Government owned them, cattle had been permitted to

roam at will for pasturage. It was not thought proper, as the land was gradually taken up by individual proprietors, to change the custom of the country in that particular and oblige cattle owners to incur the heavy expense of fencing their land, or be held as trespassers by reason of their cattle accidentally straying upon the land of others. It could never have been intended, however, to authorise cattle owners deliberately to take possession of such lands, and depasture their cattle upon them without making compensation, particularly if this were done against the will of the owners, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage. In other words, the trespass authorised, or rather condoned, was an accidental trespass caused by straying cattle."[1] Therefore a cattle owner may turn his animals to wander of their own accord, nor is he required to restrain them from grazing on lands which he knows belong to another. But he has no authority to drive and keep them there.

(*b*) The wilful herding of cattle on the unenclosed land of another without the consent and against his protest is another question and requires a different answer. As the court said on one occasion, while the owner of cattle may not be liable for their going on the land of another, it does not follow that because such browsing is excusable as a trespass, it is a matter of right. "It is an immunity, not a privilege, or at most a license revocable at the will of the tenant, who may turn his neighbour's cattle away from his grounds

[1] Lazarus v. Phelps, 152 U. S., 81.

at pleasure." To drive cattle, therefore, on the land of another wilfully for the purpose of confining them there is therefore just as unlawful in Texas as in New York.

Again, in thus feeding one's cattle on the land of another no title is thereby gained to the land itself as against the true owner. "He will not be permitted thus to ignore the truth that everyone is entitled to the exclusive enjoyment of his own property."

12. When the lands of several proprietors are enclosed in common, but used separately, though without division fences, the common law, just mentioned, still prevails, unless changed by statute. In such a case each owner must keep his cattle within his own enclosure.

13. Lastly, a land-owner is required to fence only against cattle which are lawfully at large and on adjoining ground; consequently if cattle which are *unlawfully there* go upon other land they are trespassers, and the lack of a fence around the second enclosure is no defense against their wanderings.

14. Before concluding our observations concerning animals, the dog claims peculiar attention. The judicial mind has been puzzled in determining whether to classify him as property, or as a base kind of property. This much is certain: the ancient assertion that it is not larceny to steal a dog since he is not property, while it is larceny to steal a dead dog's hide, is no longer true; the world makes progress, even in establishing dog law. One writer has declared that "a dog is property in the fullest sense of the term." Says

another: "The craven who would wantonly injure him is the subject of a fine. The thief who would steal him may be declared a felon and rendered infamous in the eyes of the law and his fellow citizens. Human life may be taken justifiably in the defense of his possession; and he is made the subject of the taxable burdens of the Government. He has been the friend, companion and solace of man; and the law only recognises the testimony of human nature, history and poetry in withdrawing him from outlawry." Yet the dog with all his fine qualities has some very bad ones, and strangers more often meet a dog, especially a large one, with more dread than pleasure. Consequently the public right to regulate the keeping of dogs is unquestioned. Very generally their owners, in order to keep them, must obtain a license, for which a tax is paid; he must put a collar around his dog's neck, and during a part of the year perhaps must muzzle him. If the legal requirements are not heeded dogs in many states, though not in all, may be killed without notice to their owners.

(*a*) To kill an unregistered dog is an extreme act, but the justification rests on the belief, which must be well founded, that a dog is a dangerous animal. "So far as a dog is a nuisance or a menace to society, he may be summarily killed at the common law, and for this matter, any other domestic animal may be." A writer, after maintaining that a dog was property, thus continues: "The destruction of any form of property without notice or hearing may in certain emergencies be justified, but the emergency must be

extreme that authorises the destruction of property without due process of law. And due process of law has the same application to property in dogs that it has to property in other animals. An ordinance or statute authorising the killing of a dog forthwith, or without an opportunity for a hearing on the part of its owner, simply because he is not licensed or registered, or is without a badge or collar, permits the taking of property without due process of law, and can find no justification in law or morals. That they may be impounded, and after a reasonable time destroyed if not redeemed by their owners, after a reasonable opportunity to do so, we have no doubt. There is no public necessity for their destruction in a more summary fashion."[1]

(*b*) Even the lives of registered dogs are by no means secure. All depends on their good behaviour. Hence arises the very important question, what act or conduct on the part of a dog justifies an individual in killing him? On one occasion A saw a dog in front of his home, and discovered that he had left some tracks on his freshly painted porch. Wrathy, he procured his gun and shot the offender. The owner of the dog having sued A for damages, his wife testified that she found him one night in the henhouse, and the next morning she made the sad discovery of a broken egg. The remainder of the justification was that the dog came around A's house at night, chased the cats into the trees and barked. Thus, the dog not only annoyed A and his wife, but the cats still more. A

[1] 90 Am. St. Rep., 215.

though never informed the dog's master of these things. The court declared that "the law does not justify one in killing his neighbour's valuable dog under these circumstances. It might as well be contended that it is justifiable for one to shoot a neighbour's horse because he is in the habit of breaking into his enclosure, or making a noise around the house at night."[1]

(*c*) As dogs have a peculiar propensity for killing sheep, by statute in many states their owner is fully justified in killing any dog that attacks or chases them. The more general rule justifying such action has been thus stated by the Supreme Court of North Carolina: "The law authorises the act of killing a dog found on a man's premises in the act of attempting to destroy his sheep, calves, conies in a warren, deer in a park or other reclaimed animals used for human food and unable to defend themselves. The law is different where the dog is chasing wild animals, such as hares or deer in a wild state, or combating with another dog. In these cases a necessity for the act of killing must be made out, or the killing will not be justified."

One of the best statements of the law on the subject is by Justice Butler.[2] "Whether before mischievous

[1] Bowers v. Horen, 93 Mich., 420. The vicious character of a dog may be shown by its repute in the locality where it is kept. Fisher v. Weinholger, 91 Minn., 22.

[2] Wroff v. Chalker, 31 Conn., 129. The following points stated and explained in this case contain an excellent summary of the law on this subject:

Although the common law recognises property in the dog, it has always been esteemed a *base* property and entitled to less consideration and protection than property in other domestic animals.

Any person may kill a *mad* dog, or one that is justly *suspected* of being mad, or that is known to have been bitten by a dog which was mad.

If a dog becomes mischievous and inclined to injure *property*, his owner is bound to restrain him *on the first notice*; and is liable for any injury he may thereafter commit to property of *any kind*.

or not, or whether, if so, the owner has knowledge of his disposition or not, if actually found doing mischief or attempting to do it alone, out of the possession of his owner as the charge of a keeper, he may be killed and the act justified at common law. And so he may be destroyed under any circumstances where it is absolutely necessary for the preservation of property. Other animals may become vicious and injure persons or property, and the injured person may have his action, but may not kill them. The discrimination against dogs results legitimately from their proneness to mischief, their uselessness and liability to hydrophobia, and the consequent base character of the property in them, and the necessity for that protection."

15. In this review of dog law, the dog's delight, pussy should not be omitted. Blackstone says that "among our elder ancestors, the ancient Britons,

Although a dog, by entering alone on the land of another and doing mischief, can not subject his owner to an action of trespass, as cattle and other animals which are inclined to rove and prey upon crops may do, yet, if the owner trespass, and his dog attend him and do mischief unbidden, that action will lie for the injury.

Whether before mischievous or not, or his owner know it or not, if found *at large*, doing or attempting to do *mischief*, or it is absolutely necessary for the preservation of property, he may be killed.

A dog which haunts the premises of another, and by barking and howling becomes a nuisance, if he cannot otherwise be prevented, may be killed.

A *ferocious* dog, accustomed to bite mankind, is a *common nuisance*, and if found at large may be destroyed by anyone.

The *keeping* of such a dog is *wrongful*, and, prima facie, the owner is liable to any person injured and the plaintiff may recover without averring *negligence* in *securing* or *taking care* of him; nor is negligence of the plaintiff a defense.

The owner of such a dog is liable if he bite a person in consequence of being *accidentally* trodden upon, or because *irritated* by a *child*, or if he attack or injure a *trespasser*.

Such a dog is a *dangerous instrument* for protection, and keeping him for that purpose can only be justified in cases where the keeping of concealed instruments may be justified to prevent a felony. Nor can such use of him by the owner under his personal direction be justified, where a like degree of injury may not be inflicted lawfully by a different instrument.

another species of reclaimed animals, viz., cats, were looked upon as creatures of intrinsic value, and the killing or stealing one was a grievous crime, and subjected the offender to a fine; especially if it belonged to the King's household, for which there was a very peculiar forfeiture." A cat, like a dog, is a base kind of property, of doubtful value, and for that reason cannot be stolen. Anyhow, this was the decision reached with respect to a Baltimorean cat. The animal belonged to Mrs. A and was found in B's house, who refused to surrender his lively possession. B was accordingly arrested on a charge of larceny and kept in custody for a couple of days before the idea dawned on the minds of those who had taken part in arresting him that cat stealing was perhaps not a criminal offense. Four wise lawyers were consulted—two opined one way, two the other. The Attorney-General of the state then dispelled the darkness that a cat was not property in the legal sense that it could not be stolen. The prisoner was at once released, but this was not the end, for he sued his prosecutors for false imprisonment.[1]

If a person cannot be prosecuted for stealing a cat he may be compelled to pay damages for killing it, even though it be only a base kind of property—that is, unfit for food—although during the Franco-German War large numbers were eaten. Chitty, an eminent English law writer, has written that "trespass lies for taking any animal or bird out of the actual possession of a person who has secured the same; but

[1] 40 Central Law Journal, p. 41.

no action lies for enticing from the premises of the owner and afterward killing or injuring a cat, which is not considered of any value in the law." Poor pussy! If Chitty is correct thou art an outlaw, but what says a Canadian tribunal? "I have no hesitation," says Judge Lonsdale,[1] "in giving it as my opinion that a person may have a property in a cat, and, therefore, that an action will lie to recover damages for killing it. There may be circumstances under which it would be justifiable to kill a cat, but it is not justifiable to do so merely because it it a trespasser, even though after game."

16. Another topic of every-day importance is the legal nature of the different kinds of contracts for employment. This has been fully considered in the last part of our work, and nothing therefore need be added here.

17. There is a legal maxim that one must use his property in such a manner as not to injure another. In applying this maxim, if a landowner in improving his land, does so unskilfully or negligently, whereby others are injured, he is liable for the loss. Thus in using explosives, he should not use such powerful ones as to injure his neighbour's house, especially when he can avoid such a result by using a milder explosive, or a smaller quantity, or by pursuing some other way, even though the expense would be greater. And if the effect of blasting would be to shake down a neighbour's house, its occupant would have the right

[1] Whittingham v. Iderson, 8 Upper Canada Law Journal, 14. I have come across this case in Mr. Ingham's excellent work on the Law of Animals.

to apply for an injunction against the blaster, as the recovery of damages would be an inadequate remedy and compensation.[1]

Again a land-owner may excavate on his own land, close to the line of the adjoining owner, but if the excavation is made in a negligent, wrongful or reckless manner, the person excavating will be liable for the full consequences of his acts, not merely for the injury to the soil itself, but to the improvements thereon.[2] Even if the excavation be made by an independent contractor, the owner of the land is liable for the injury caused to the house of an adjoining owner, when the consequence might have been reasonably anticipated, and no notice had been given to him to protect his property. But if a person who intends to excavate his own lot, near to the wall of an adjoining house, and below its foundation, gives reasonable notice of his intention to the adjoining owner, the latter must protect his own property, and the other is not liable for damages that may happen if the excavation is made with ordinary care.[3] This is the rule at common law. "There is no obligation on the part of an excavating owner to protect the walls and buildings of an adjoining owner by shoring, underpinning, or the like, though conditions may exist which will necessitate protection of some kind because of the duty of exercising reasonable care. In some states statutes regulate the depth to which excavations may be made in designated localities and

[1] Hill v. Schneider, 13 N. Y. App. Div., 299.
[2] Note, 33 Am. St. Rep., 468.
[3] Bonaparte v. Wiseman, 89 Md., 12.

require persons making excavations on their land beyond the prescribed depth to protect walls and buildings of adjoining owners from injury. This duty does not end with the completion of the excavation. But as to one excavating within the prescribed limits the rule of the common law applies and there is no duty to furnish protection."[1] Of course if the excavating owner agrees with the other to protect his building from the effects of the excavation, he is liable for the injuries caused by his negligence.

The difficulty of adjusting the rights of adjoining owners with respect to excavations has led some states to pass statutes regulating the depth to which they may be made and requiring the excavator to protect the adjoining owner from injury if this depth be exceeded.[2]

An important distinction exists when the work is done by an independent contractor. The general rule is when a contractor is pursuing an independent employment, and is free to exercise his own judgment in the use of means, he alone is liable for any negligence or unskilfulness arising from the undertaking.[3] But when the resulting injury is one that might have been anticipated as the probable consequence of the work, then the employe is liable therefor.

18. An owner of land on which something dangerous exists, like a tree in an unsound condition which is likely to fall if struck by a heavy wind, and injure the adjoining owner's property, should take proper

[1] 1 Cyc., 780.
[2] In Ohio the limit is nine feet, in New York, ten feet. 1 Cyc., 781.
[3] Deford v. State of Maryland, 30 Md., 179.

action to remove the danger, and if he does not, he is responsible for the consequences.[1] This rule has often been applied to walls left unsafe, and tottering after a fire.[2]

[1] Gibson v. Denton, 4 N. Y. App. Div., 198.
[2] Sessingut v. Perry, 67 Ind., 408.

CHAPTER VIII

PERSONAL PROPERTY; ANIMALS

1. Basis of classification.
2. Transformation of real and personal property.
3. Importance of understanding the change.
4. What property is personal.
5. Animals; how classified.
6. Ownership of wild animals in natural state.
7. Actions against owners of ferocious animals.
8. Application to domestic animals.
9. Dogs.
10. Herds of wild or partly wild cattle.
11. Bees.
12. Owner of land may forbid others from hunting on his land.
13. To whom increase belongs.
14. How animals must be kept by baiter or keeper.
15. What kind of horses livery stable keeper must keep.
16. Engagement of hirer.
17. Liability of keeper who furnishes driver.
18. When hirer is liable to owner for death of horse.

1. The classification of property into real and personal is based wholly on the character or quality of

the property itself. This is the chief distinguishing mark, but it is not infallible, for, under some conditions, land becomes personal property, and personal property is sometimes transformed into real. Thus, a tree, while standing, is real property; cut it down and convert it into furniture, and it becomes personal property. Coal stored in the earth is real property; mine it, and its character is changed into personal property.

2. In like manner personal property may be changed into real. A familiar illustration is bricks and mortar, which are personal property when movable, but, fashioned into a house, become a part of it and thus a part of the land whereon it stands. Finally, the house may be pulled down; and then the materials that formed the structure return to their original quality as personal property.

3. It is important to understand the transitory or changeable nature, to the legal eye, of all property.

4. We have already defined land. All other property is personal. We shall now proceed to describe the various kinds of personal property, and the modes of acquiring absolute ownership thereof.

5. Animals are personal property, and the law classifies them as tame and wild, applying very different principles to the two classes. To the former belong horses, cattle, sheep and poultry. Of the names of the wild animals no mention need be made, but when they become domesticated, as they often do through capture and taming, then some difficult questions arise concerning the time when their nature has been so

transformed from wild to domestic animals, as to require the application, respectively, of different legal principles.

6. In their natural state wild animals are not owned by anyone; a right to them can be acquired only by capture or possession. In like manner if, after their capture, they escape and return to their original state, ownership in them immediately ceases. This rule is somewhat qualified, as will soon appear.

In order to acquire a right to wild animals they must be caught. To the hare especially this rule has long had a familiar application. Capture can be effected by means of traps, snares, and other deceptive arrangements, or by shooting. A wounded animal does not become the property of the hunter unless he follows up his advantage with reasonable diligence. In like manner the old Roman law declared that property in a wounded beast could not be acquired until the animal was actually taken.

If the wild animals of a menagerie should escape from their owner's immediate possession, they would not belong to the first person who captured them. A Georgia court has remarked that if a canary bird has accidentally escaped from its owner, it would be contrary to our sense of justice to permit the captor to retain it permanently as his own. The same thing may be said of the entertaining monkey that accompanies the travelling organist.

When the killing or capturing is complete, ownership in a wild animal is as perfect as ownership in a tame one, or in land, peanuts, or anything else.

Thus, doves kept in a dovecote are domestic, and a person may be liable to indictment for stealing them. More generally, young animals that are tame, and practically within the dominion of the owner, belong to him, and the taking of them is a theft.

Whether the submission of a wild animal is so complete as to put him in the other class is a question of fact. If they run away, but return to their master, his ownership in them is preserved, notwithstanding their propensity to play the tramp. If, on the other hand, an animal of this kind should lose himself and return to the woods and show no disposition to return to his owner, another person would be justified in capturing him and asserting his ownership or in killing and devouring him.

7. An action lies against the owner of a ferocious animal, dog, cat, or other beast, for injuries inflicted on one who is free from blame. It must be proved that the animal was vicious, and that the owner knew of its real character. Animals that are known to be dangerous to mankind ought to be kept from doing injury; otherwise their owners will be responsible for the damage done by them to property or persons.

8. In applying this principle to damage done by a domestic animal it must be modified. To fasten a liability on the owner he must have seen or heard enough to convince a man of ordinary prudence of the animal's inclination to do injury. With notice to the owner of such propensity, he is liable for whatever damages may be done by his dog or other animal to any person, or to his property. The differ-

ence is inconsequential whether the animal committed the injury by reason of his viciousness and ferocity, or from good nature and playfulness—the intent of the animal is not material. The owner or keeper, having knowledge of his disposition or capacity to commit such injuries, must restrain the animal at his peril.[1]

9. Dogs partake of the character of both wild and domestic animals. By reason of their common use they have become the creatures of statutory regulation. Nowadays, almost everywhere the registry of dogs is required; even after this is done, they are not entirely within the control of their owners. Therefore one has a natural right to destroy a dog or other animal doing injury on his premises. Thus, a person has a natural right to defend a flock of sheep from the attack of a dog, and would be justified in killing him if need be to protect them. Unless the emergency is perilous, the more appropriate course is to drive off the unwelcome intruder, or to restrain him from doing damage.

A collar worn by a dog and having a man's name thereon is evidence that he is the owner. But it is not conclusive evidence, and does not prevent the admission of other evidence to disprove ownership.

[1] In an action on a Kentucky statue providing that any person keeping dogs shall be liable to anyone injured by them, containing also the provision that no recovery shall be had in case the person injured is on the owner's premises after night, or engaged in an unlawful act in the daytime, the owner of a dog is liable for injuries inflicted on a person when he is in the owner's custody or in the custody of a kennel club on exhibition. Bush v. Wathen, 104 Ky., 548.

The owner of a vicious animal passing through a city street must restrain the beast from injuring anyone. 68 S. L. Rep., 764.

10. Herds of cattle on remote lands are usually branded by their owners. Cattle raised in this manner are subject to elaborate regulations.

11. Among other wild animals may be mentioned the busy bee. When hived they belong to the person who captured them. If they afterward depart his right of ownership continues so long as they are within his ken. He also has a right to pursue and capture them, even though they should settle on a tree belonging to another. But he cannot gain title to bees when trespassing on the premises of another person.

If a person finds a tree containing a hive on another's land and marks it with his initials, he does not thereby acquire exclusive property in the bees as against the owner of the land. And if he obtains a license from the owner to take them, he gains no property thereby until he takes them away. He cannot therefore maintain trespass against a third person who should take them away, having obtained a subsequent license to do so from the owner of the land.

12. Land-owners may forbid all others to enter on their premises for the purpose of hunting wild animals, and, after receiving such a notice, they are trespassers unless postive laws have been enacted to the contrary. In England, for many centuries, laws have existed enabling persons under various conditions to pass with the utmost freedom over the lands of others to engage in their sports of game. In this country our policy is very different, and hunters have

less protection and regard. It is enough to say that after one has been forbidden to enter on the land of another, and is a trespasser, he cannot acquire any title to anything he may capture while thus acting as an intruder.

13. Any increase of domestic animals belongs to the owner of the dam or mother; hence, the owner of a cow is entitled to the calf, of the mare, to the foal, etc. This is in harmony with the Roman law, and is the rule everywhere.

14. When animals are put into the keeping of others, they must be fed and perhaps sheltered. The law implies that they are reasonably fit for the work which they are hired to perform. On one occasion a mare was hired to be used in operating a street railway. The company had the right, so the court said, to assume that she was suitable for such work, that it was only required to use and treat her with reasonable care, that if after doing so it was plainly manifest that further use would be injurious and endanger health and life, it was their duty to use her no longer without notifying the owner and obtaining his consent.[1]

15. When one lets a horse for hire, he impliedly promises or warrants that the animal is fit and suitable for the purpose for which it was hired, and that the horse is not unruly or vicious, but is safe, and manageable. Furthermore, a livery stable keeper should inform himself of the habits and disposition of the horses kept by him, and if he knows that they

[1] Bass v. Cantor, 123 Ind., 444.

are dangerous and unsuitable for the purpose for which they are generally used, or could ascertain this fact by reasonable exertion, he is liable for any injuries to his customers resulting from their vicious propensities. The law will not permit him to close his eyes and ears and thus remain ignorant of the vicious habits of his horses, and relieve him from liability for injuries to a customer resulting from such habits.[1]

16. A person taking a horse to hire engages to take the same care of it that a prudent man would of his own property, and is responsible for all injuries that result from his neglect.[2] If the horse becomes sick, or exhausted, he should abstain from using the animal, and if he pursues his journey he is liable for all the injury that may result. Likewise if bad usage or want of care on the part of the hirer produce death, the value of the horse may be recovered.[3]

The hirer also agrees to put the animal to no other use than that for which it was hired, to return it at the time appointed, to pay the agreed price for its use, and in general to observe whatever is prescribed by the contract, by law or by custom. The hirer who, by improperly feeding and watering him, has made him sick and returned him in this condition to the owner, is liable for his full value, if the owner by the use of reasonable care and by supplying a suitable veterinary surgeon, who treated him

[1] Conn v. Hunsberger, 224 Pa., 154.
[2] Thompson v. Harlow, 31 Ga., 348.
[3] Graves v. Moses, 13 Minn., 335.

according to his best judgment, was unable to cure him.[1]

17. Again, if one hire a carriage and horse to go a journey, also a driver from the owner, and the horses are injured by immoderate driving, the person who hired them is not liable to the owner for damages unless he interfered with the action of the driver.[2]

18. Lastly, the owner of a horse who has let the animal to go a specified journey within a given time, cannot recover for the loss of the horse when it was driven only in that time, and by the stipulated way and driver, if its death results from overtaxing the animal to fulfil the agreement. But when the hirer continues to use the animal after the expiration of the specified time, or beyond the specified place or by some other route, such departure from the terms of the agreement, unless compelled by circumstaances which the hirer could not control, is a wrong for which he is liable. And this rule is applied even if the hirer be a minor or the contract of hiring be void by reason of violating the Sunday law.

[1] Eastman v. Sanborn, 85 Mass., 594.
[2] Hughes v. Boyer, 9 Watts, 550.

CHAPTER IX

LETTERS PATENT; COPYRIGHT; TRADE-MARK

§ 1. Letters Patent

1. For what granted.
2. To whom granted; aliens.
3. Meaning of discovery.
4. What may be patented.
5. A principle cannot be.
6. Patent for process.
7. Patent for machines and improvements:
   a.—What is a patentable machine,
   b.—What is a patentable improvement,
   c.—What is a manufacture.
8. Patent for composition of matter.
9. Distinction between machine and manufacture.
10. Design must be new and useful.
11. Distinction between important and unimportant inventions.
12. Difficulty in drawing the distinction.
13. Substitution of superior for inferior materials.
14. To enlarge and strengthen a machine is not a patentable invention.
15. Aggregation is not invention.
16. Omission of parts is not invention.
17. Combination of old device into new article.

18. Want of invention can be detected by above rules.
19. To change form of machine may, or may not, be a patentable invention.
20. Change of proportion.
21. What an inventor is presumed to borrow.
22. Foreign patent.
23. Invention must be novel.
24. Novelty of design.
25. Novelty is a question of fact.
26. On whom rests the burden of proof of novelty.
27. Invention must be useful.
28. Abandonment.
29. Invention is a question of fact.
30. Every machine must be constructed, as well as invented.
31. Inventor need not be constructor.
32. Application.
33. Petition.
34. Specification.
35. Claims.
36. Applicant's signature.
37. Application by executor or administrator.
38. Fees.
39. Drawings.
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41. Specimens of composition.
42. Date of application.
43. Examination.
44. Rejection of application.
45. Appeal to commissioner.
46. Appeal from commissioner to court of appeals.

47. Amendment of application.
48. Only the inventor can obtain a patent.

1. In the early days of our National Government Congress enacted laws securing to inventors the fruits of their inventions. Any person who invents or discovers a new and useful art, machine, manufacture or composition of matter, or new and useful improvement of the same, may obtain therefor a patent.

2. Only a person who invented the thing patented or an assignee or representative of the legal inventor can lawfully obtain a patent. Consequently, a patent obtained by one or two or more joint inventors would not be valid. It is not true that the co-inventor invented the thing patented, but only assisted. If he could have a valid patent for the thing or process, each of his co-inventors would have likewise, and a strangely mixed interest would exist.

A patent obtained by several persons for an invention by one of them is void. Again, should several independent inventions be severally claimed in a joint patent, and one of these inventions be made by one of the joint applicants, the claim to the patent covering that invention would be void.

The law also provides that aliens who intend to become citizens may obtain patents as a reward for their inventive genius.

3. The word discovery in patent law does not have its broadest significance. By discovery is really meant an invention. The same man may invent a machine, and discover an island, or a law of nature. For do-

ing the first thing the law would grant to him a patent; it cannot grant him one for discovering an island or a natural law.

4. The statute provides for patenting four classes of things. They include an art, a machine, a manufacture, a composition of matter.

These inventions are the results of original thought, as distinguished clearly from a discovery of the laws of nature. A law of nature that is discovered may be utilised by means of an art or a machine, and this, not the discovery of the law itself, is rewarded by a patent.

5. In 1729 Stephen Gray discovered the electric current, and, in 1820, Oersted made the discovery that it would deflect a magnetic needle placed in its neighbourhood.[1] The discovery of this principle led Morse to invent the telegraph, and, in 1844, he embodied his invention in a working telegraph from Washington to Baltimore. In his application for a patent he made many claims, but the eighth claim was the most important—the use of an electric current for making intelligible signs at any distance. This claim was held to be void.

A person, therefore, cannot patent a principle, but only a process or mode of applying the principle. The difference may be illustrated by describing one or two inventions. A long time ago it was ascertained that cast iron when cooled suddenly is very hard and also very brittle. On the other hand, when cooling slowly it is soft and tough. In making a car

[1] Walker on Patents, p. 7 (5th Ed.).

wheel it was desirable to form, if possible, a very hard periphery to endure a great strain, and a very tough centre. An invention appeared combining both ideas, a very hard rolling surface with a soft centre. It was ascertained that, in suddenly cooling the outside of the wheel, it contracted more rapidly than the parts that cooled slowly; and that, consequently, the wheel was very weak. About fifty years ago an inventor, Whitney, invented a mode of casting a wheel that combined both ideas perfectly. The Supreme Court declared that his invention of the process of making such a wheel was valid, and, therefore, patentable.

One of the most familiar illustrations is the Bell telephone patent, a process for applying laws known before, but applied by Bell in a peculiar manner.

There is a clear distinction between Morse's eighth claim and the claims of Whitney and Bell. Morse sought to obtain a patent for a single principle; the other inventors for a process or mode of applying a principle.

6. A patent for a process is a patent for a continuation of all the laws of nature utilised by that process.

A patent for a principle is a patent for one only of the laws of nature used in the process. "If a patent," says Walker, "for a principle were granted and sustained, it would be much broader than a patent for a process, because it would cover all processes which aim at the same result and which must use the particular law of nature covered by the patent for a principle, no matter in what combination with

other laws. A patent for a process, on the other hand, covers only its own method of using all the laws of nature which it utilises. To grant and sustain a patent for a principle would induce an inventor to guess which of the laws of nature used in his process will always be found indispensable, and guessing rightly, would enable him, by claiming that particular law to suppress all particular processes using it. . . . A patent for a process, on the contrary, leaves the field open to ingenious men to invent and use other processes using part of the laws used by the patented process, or using all of them in other combinations and methods.[1]

7. Machines and their improvements constitute the majority of American patents.

(*a*) A machine is a combination of improved mechanical parts adopted to receive motion and to apply it in producing some mechanical result. The parts of the machine may be old while the machine as a whole and also the subdivisions are proper subjects of a patent.

(*b*) An improvement may consist in an addition or a subtraction, or in substituting, for one or more of its parts, something different, or in so rearranging its parts as to make it work better than before. Whether or not a given improvement is patentable will depend on several considerations. First of all it must be distinguished from an improvement in mere mechanical skill of construction. Again, it must not be an infringement on some other invention.

[1] Walker, § 14, p. 10.

(*c*) The word manufacture includes everything made by the hand of man and also processes of manufacture.

8. The phrase, "composition of matter," covers all compositions of two or more substances. It includes, therefore, all composite articles resulting from chemical union of from mechanical mixture, whether gases, fluids, powders or solids.[1] To be a proper subject of a patent a composition of matter, like a process, a machine, or a manufacture, must be invented. It must also be novel and useful. These matters will be considered hereafter.

9. The distinction between a machine and a manufacture is not always clear, and the same thing may be said concerning a manufacture and a composition of matter. But an inventor whose invention belongs to one of these three classes is entitled to a patent.

10. The law provides that any person who, by his own industry, genius, and expense, has invented and produced any new and original design for the printing of woolen, silk, cotton or other fabrics, any new and original impression, ornament, pattern, print, or picture to be printed, cast or otherwise placed on or worked into any article of manufacture, or any new, useful, and original shape or configuration of any article of manufacture, may obtain a patent therefor.

The law thus recognises the fact that some designs are useful as well as ornamental, while others have no utility except to please the eye of the beholder. It is questionable whether the framers of the Consti-

[1] Walker, § 18, p. 16.

tution intended to provide patents for designs which are useful only because they are ornamental. In our age beauty is generally believed to have utility of its own, and patents are, therefore, granted, and sustained for designs which are useful only because they are beautiful.

11. A distinction must be made between the invention of something of considerable importance and a slight development in a process of manufacture, etc. Justice Bradley has developed this idea with great clearness. He says that, in the development of manufactures, there is a constant demand for new appliances which the skill of ordinary workmen and engineers are adequate to devise. Each step in advance prepares the way for something more. If, to each slight advance, a patent was given, the consequences would be injurious to all. The design of the patent laws, he remarks, is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favour. It is not the object of these laws to grant a monopoly for every trifling device, every shadow of a shade of an idea which would naturally and spontaneously occur to any skilled machinist or operator in the ordinary process of manufacture. Were exclusive privileges granted for every little thing a pack of speculative schemers would arise and watch every advancing wave of improvement and gather its foam in the form of patented monopolies. Were they permitted to do this they would, in fact, lay a heavy tax on the industries

of the country without contributing anything to its real advancement.

12. To distinguish between patentable manufactures and minor ones that are not, is not always easy. In some cases the discovered invention seems very slight, yet is very important, and, therefore, is patentable; in other cases, the invention is less important and not within the law. An interesting case may be given—that of a carbon filament invented by Edison. The filaments used before Edison invented them had a diameter of one-thirty-second of an inch. Edison invented a carbon having a diameter of one-sixty-fourth of an inch. This seems a trifling thing, but the consequences were revolutionary. By the old filament, though lighting was possible, it was hardly practical. By the reduction of the diameter of the filament half the cost of lighting was saved. In other words, the invention of Edison, as an eminent writer has said, lies at the foundation of the incandescent electric lighting of the world. This invention, slight as it seemed in one sense, was clearly patentable.

Another illustration may be given—that of articles used to fill wood in order to give a solid surface. Formerly silicious clays were used, and someone ascertained that the use of powdered fine quartz or feldspar, mixed with oil, wrought greatly improved results. The opponents to this patent claimed that they were merely substitutes. The courts held otherwise, declaring that the use of these substances resulted in very different and greatly improved effects, and that their inventor was entitled to legal protection.

While it is not easy always to distinguish between a new thing that is important and patentable and something else also new, but less important because it may be the common knowledge of other persons, yet there are many negative rules for determining what is not patentable. One of these has already been foreshadowed, namely, that the products of mere mechanical skill cannot be secured by invention for the same reason that excellency of workmanship is no invention, and, therefore, not entitled to a patent.

13. Again, the invention of substituting superior for other materials, in making one or more or all of the parts of a thing, is not an invention within the meaning of the law. The courts hold that an improvement must be the result of judgment and skill in the selection and adaptation of materials, and not merely the product of the inventive faculties of those who made them. So there is no invention in substituting superior for inferior materials. There is none in selecting from a number of materials the one best adapted to the purpose in view, and none in substituting one well-known form of a particular material for another well-known form of the same material. It is not an invention to improve a known structure by substituting a new equivalent for any of its parts.

14. It is not an invention to enlarge or strengthen a machine so that it will operate on larger materials than before. Nor is it an invention to change the degree of a thing or one feature of a thing. There have been numerous cases in which patents have been

sought for changes or substitutions of one thing for another. Many of these have failed because they have not possessed the degree of inventiveness required by the law.

15. Aggregation is not invention. It is no invention to duplicate one or more parts of a machine unless that duplication causes a new mode of operating the duplicated parts.

16. It is not invention to omit one or more parts of an existing thing, unless that omission causes a new mode of operating the parts retained.

17. It is not invention to combine old devices into a new article without producing any new mode of operation.

18. Want of invention, if it already exists in a particular process or thing, can nearly always be detected by one or more of these rules. When a case arises to which none of them applies, and an uncertainty still remains, this may, perhaps, be removed by means of a rule lately prescribed by the highest federal tribunal. When the other facts in the case leave the invention in doubt, the fact that the device has gone into general use and is displacing other devices which had previously been employed for analogous uses is sufficient to turn the scale in favour of the existence of invention. The fact, however, that the device has been forced into extensive sale by judicious advertising and business energy is not proof of the superiority of invention.[1]

19. To change the form of a machine or manu-

[1] Smith v. Dental Vulcanite Co., 93 U. S., 495.

facture is sometimes invention and sometimes not. When a change of form is within the domain of mere construction it is not invention; when it involves a change of mode of operation or function or results it is invention, unless this is held to be otherwise in pursuance of some other rule.

20. To change the proportions of a machine or manufacture will seldom or never amount to invention, but it may be invention to change the proportion of the ingredients of a chemical combination or of other compositions of matter.

21. Every inventor is presumed to have borrowed whatever he produces that was first actually invented and used in the United States, or was previously patented or described in a printed publication in any country.

23. Another element of patentability is novelty. Novelty is the name for newness, but that name does not indicate the foundation of the thing which it denotes. One of the ways of ascertaining novelty is to prove it from the negative side.

Novelty is not lacking by reason of prior knowledge and prior use in a foreign country, provided the patentee believed himself to be the first inventor, and provided, also, that the thing had not been patented elsewhere or described in a printed publication. Indeed, a claimant to an independent invention in this country, who has received knowledge before applying for a patent of a prior use of the invention in a foreign country, is not thereby deprived of his protection of the patent laws if, before receiving the in-

formation, his idea had been so developed and applied as to constitute an invention if expressed in a patent.[1]

Novelty is not lacking by reason of the issue of any United States patent after the patented invention was made, though application for it was made before that event, nor by any private or prior patent granted in any foreign country, nor by any public patent granted in England unless it was sealed before the person obtaining the American patent made the invention.

Novelty is not negatived by anything that was invented, patented or described in a printed publication prior to the granting of the patent sought to be anticipated, or even prior to the application therefor, unless the anticipating event occurred prior to the date of the invention secured by that patent,[2]

Novelty is not lacking by reason of any prior abandoned application for a patent. This furnishes no evidence that any specimen of the thing described was ever made or used anywhere.

But evidence that the person who made an abandoned application also intended to carry his invention into practical use may be admitted to aid the court to determine the date and nature of the invention which the applicant sought to put into a working form. If it appears that his invention outside his abandoned application did not amount to enough to negative the novelty of the subsequent patent to a

[1] American Sulphite Pulp Co. v. Howland Falls Pulp Co., 80 Fed. Rep., 395.
[2] Walker, § 69.

later inventor, then that abandoned application becomes immaterial.

Novelty is not lacking by reason of any successful application for a patent, or by any document pertaining thereto, other than the letters patent issued in pursuance of the same. When such an applicant has offered to prove the existence of something which is not shown by the letters patent themselves, the justice and propriety of the rule are apparent.

Novelty is not lacking by reason of any prior unpublished drawings, no matter how completely they may exhibit the patented invention. The same thing may be said of any patented model, no matter how it may coincide with the thing covered by the patent. Walker says: "The reason of this rule is not stated with fulness in either of the cases which support it, but that reason is deducible from the statute and from the nature of drawings and models."[1]

Novelty is not lacking by anything not satisfactorily identical with the subject of the patent, even though the function of the prior thing was identical with the patented article.

Novelty of any design is not negatived by the fact that all of its features can be collected out of scattered prior designs.

Novelty is not negatived by anything incapable of the function of the thing covered by the patent, even though the character of the prior thing was chemically identical with the patented thing or mechanically similar to it.

[1] Patents § 60.

Novelty is not negatived by the fact that every part of the patented thing is old. This rule springs from the doctrine which allows patents for new combinations of old devices. The whole is different from the sum of all its parts. If, however, a new assembling of old things amounts only to aggregation and not to combination—in other words, results in no new mode of operation—the patent will be void for want of invention, though not void for want of novelty.

Novelty is not negatived by any prior accidental production of the same thing without any knowledge on the part of the producer that has enabled him to repeat that production.

Novelty is not negatived by anything which was invented, patented or described in a printed publication prior to the granting of the patent in question or even prior to the application for the same.

Novelty is not negatived by anything which was neither designed, nor apparently adapted, nor actually used, to perform the function of the thing covered by a patent, though it might have been made to perform that function by means not substantially different from that of the patented thing.

Novelty is lacking whenever there was prior knowledge by even a single person of use in this country of the thing patented. This rule applies even to cases where that knowledge of use was purposely kept secret, and it applies, no matter how limited that use may have been.

Novelty is also lacking whenever there is evidence that even one specimen of the thing patented was

made in this country prior to its invention by the patentee. This rule results through statute which provides that things, in order to be patentable, must not have been known or used by others in this country.

Novelty is lacking by proof of prior use where the invention was understood in point of method though not correctly understood in point of result.

The use of an invention by the inventor, or by persons under his direction, if made in good faith, solely to test its qualities, remedy its defects and bring it to perfection is not, although others derive a knowledge of it, a public use within the meaning of the patent law, and does not preclude him from obtaining letters patent therefor.[1]

24. The question of the novelty of a design is to be determined by its comparative appearance in the eyes of average observers, and not in the eyes of experts making any analytical inspection.

25. Questions of novelty are questions of fact; therefore, to determine them an investigation is necessary, which is conducted in the same manner, as all other investigations of a similar character.

26. The burden of proof of a want of novelty rests on him who avers it, and every reasonable doubt should be resolved against him. Novelty is lacking only by proof which puts the fact beyond doubt.

27. The subject of the patent must possess something more than invention and novelty; the subject must be useful. Utility is absent from all processes and devices that cannot be used to perform their

[1] Elizabeth v. Pavement Co., 97 U. S. 126.

specific functions, and patents for them are void. An illustration may be given. A patent covered the cylinder of a threshing machine that had rows of teeth inserted in its convex surface which revolved within a barrel having no teeth. The contrivance, therefore, was useless; nevertheless, a patent was granted. The patentee or some other person, by simply inserting rows of teeth in the outside surface of the barrel produced the useful threshing machine, which, superseding the ancient flail, is one of the most important of all agricultural machines. In such cases, says Chancellor Walworth, the patent is void if the machine will not answer the purpose for which it was intended without some additional alteration which the mechanic who is to construct it must introduce of his own invention, and which had not been indicated, or disclosed by the patentee at the time his patent was issued.[1]

If a device performs a good function, though but imperfectly, its utility is not negatived by the fact that it can be improved and made to operate better. Nor is its utility negatived by later superior inventions that have superseded the use of it. Indeed, patents are never held void for want of utility merely because they do their work poorly. In such cases no harm results to the public from the exclusive right, because few will use the invention.

Utility is not negatived by the fact that the manufacture covered by the patent has no function except to decorate the object to which it is to be at-

[1] Burrall v. Jewett, 2 Paige, 143.

tached. In this case utility resides in beauty. Whatever is beautiful in the eye of the patent law is useful, because beauty gives pleasure, and pleasure is the ultimate object of use in many things.

Utility is negatived if the function performed by the invention is injurious to morals, health, or the good order of society. An invention to improve the art of forgery, or to spread contagious disease, or to contaminate water, would be unpatentable.

Utility is negatived by the fact that the patented process or thing is injurious to the thing to which it is applicable, and also that the function performed by the patented part of the machine, though good in itself, is injurious to the utility of the machine as a whole.

28. An inventor may abandon an unsuccessful endeavour to make an invention; or, having made it, may abandon it to the public; or, having made an invention and applied for a patent, may abandon that application without abandoning the invention. Transactions of the first kind are called unsuccessful abandoned experiments. They confer no rights on those who make them and affect no rights of other persons.

Abandonment of an invention may be actual or constructive. It is actual when resulting from intention. That abandonment is constructive which is the result of some statute, regardless of the inventor's intention.

Actual abandonment occurs when there is an entire giving up of all intention of securing a patent. Such relinquishment may be shown by direct or other evi-

dence. Of course, an inventor abandons his invention to the public when he makes an express declaration to that effect.

29. An invention is a question of fact, and not of law. In applying this rule patents are not held void for want of invention unless it is clearly absent.

30. Every machine, before it can be used, must be constructed as well as invented. If one man does all the inventing and another all the constructing, the first is the sole inventor. If both participate in the inventing they are joint inventors regardless of the fact that both took part in the constructing.

31. To constitute a man an inventor he need not have skill enough to embody his invention in a working machine, model, or drawing. If he furnishes all the ideas needed to produce the invention he may avail himself of the mechanical skill of others to embody or represent his contrivance, and still be the sole inventor; but it is no invention to conceive a result and employ another to produce that result.

32. An application consists in doing several things: Depositing in the Patent Office a written petition to the Commissioner of Patents, and also written specifications of the invention with an oath to them; paying the Patent Office fee, in some cases; depositing a drawing; in others, a model; in others, specimens.

33. The petition is signed by the applicant and addressed to the Commissioner of Patents, stating the petitioner's name and residence, and requesting the grant of the patent for the invention therein designated. The petition must be signed by the inventor

himself, and not by an assignee, though he may properly request that the patent be issued to an assignee. An inventor who becomes insane, or dies before signing his petition, may act by his guardian in the one case, and by his executor or administrator in the other.[1]

34. The specification consists of six parts: The preamble; the general statement of the thing and object of the invention; a brief description of the drawings; a detailed description of the invention; the claim or claims put forth by the inventor; his signature.

The preamble states the name, present nationality, residence and post office address of the inventor and the title of the invention, in order to connect the specifications with the petition.

The general statement of the nature and object is a mode of introducing the more elaborate description. The description of the drawings is a convenience in understanding them.

The detailed description of the invention must be full enough to enable any person skilled in the art or science to which the invention appertains to make or use it. If it be a machine, manufacture or compound, the description is ineffective unless it meets this requirement, and the patent, if granted, will be void.

The statute also says, in the case of a machine, that an applicant shall explain the principle and the best mode in which he has undertaken to apply that prin-

[1] For form of assignment see Vol. VI, Appendix No. 13.

ciple so as to distinguish it from other inventions. The object of this is to identify the invention.

The law does not mean that the inventor must explain the law of nature whereby his machine works, for, if it did, neither Morse nor Bell could have complied with the requirement in describing the telegraph or telephone. The provision means that the essential characteristics of the machine shall be explained, and that the inventor shall state the mode which he regards to be the best.

35. The claim or claims must necessarily form a part of every specification. The statute says that "the applicant shall particularly point out and distinctly claim the part, improvement, or contribution which he claims as his invention or discovery." Says Walker: "The practice of the Patent Office has always been to require the claim or claims to be made in that particular part of the specification which immediately precedes the signatures. It is the practice of some solicitors of patents to write claims in vague phraseology, with an idea that vagueness is elasticity and that elasticity is excellence. They stretch their claims to catch infringers, and are apt to stretch them to the breaking point, by making them vague and elastic enough to cover inventions in the prior art, and to be invalidated thereby."

An applicant whose description sets forth an entire machine may lawfully make a claim co-extensive with the description if the machine, as a whole, possesses novelty. Such a claim ought rarely to be the only one in a patent, because it can, in most cases, be

readily evaded; the proper practice is to fix on the new parts or new combinations, and to make a separate claim for each of these parts and combinations. If the applicant desires he can apply for and receive a separate patent for each of these parts and combinations.

A part of a machine claimed alone may be specified by the use of its name, when no other part of the machine has a similar name; but when the use of the name alone is not sufficiently specific to show what part of the machine is intended, that object can be accomplished by naming in the claim a reference letter or numeral to indicate that part in the description and in the drawings.

To a description that sets forth a manufacture there ought to be a separate claim for each of its patentable features. For, if there is but one claim covering all its features, those persons who infringe even the least of these incur a liability for making, using, or selling articles which contain all the others.

In a description relating to a composition of matter the claim should cover that composition in its entirety, and should, either expressly or by reference to the description, specify the different proportions the ingredients bear to each other. When some of the described ingredients may be left out the applicant, if he states that fact in the description, may have a separate claim for the composition of matter composed only of the residue, or he may have a single claim covering the indispensable ingredient whether with or without the others.

In a description relating to a process the claim should cover all the necessary occurrences in that process, and cover no more. If it covers less it will be void for want of utility; if it covers more it can be evaded by persons who omit any one if not necessary in using the others.

"Where the description and its accompanying drawing or photograph represent a design, the claim may identify its subject by a reference to that drawing or photograph. . . . A design-patent may contain a claim for an entire design with other claims for such of the parts of the design as are independently patentable. But several unconnected ornaments cannot lawfully be aggregated and claimed together in one claim." [1]

36. The signature of the applicant must be in full and legibly written. The oath need not be in writing nor recorded, and the recital in the letters patent that the required oath was made to the application, is conclusive evidence of the fact.

37. The oath to an application made by an executor or administrator of a deceased inventor may be so varied from the ordinary form as to meet his case; whether it is needful for him to swear that he believes the deceased inventor to be the first inventor, or believes that he was, in fact, the first inventor of the invention, is an unsettled question. If the first view be correct then an executor may, without perjuring himself, obtain a patent for an invention which he may know has been in previous use. If the second

[1] Walker, § 120a.

view be correct then he is cut off from such a practice.

38. The fee on applying for a patent for a process, machine, or manufacture, is $15, and there is a final fee of $20, payable after the patent is allowed and before its issue. The fees for patenting designs vary with the length of the terms for which the patents are sought. For a term of three and a half years the fee is $10; for a period twice as long $15; for fourteen years $30; and the fees for design patents must be paid in advance. The final fees above mentioned must be paid within six months after allowance of the patent; a notice thereof is sent to the applicant or his agent; and if it is not paid within that time the patent is withheld.

39. Drawings are required to be furnished by the applicants for patents in all cases in which an invention may be thus illustrated. They must also be signed by the applicant and attested by two witnesses. The drawings must also show every feature of the invention covered by the claims. An invention consisting of the improvement of an old machine must show, in one or more views, the invention itself disconnected from the old structure, and also another view with so much only of the old structure as will show the connection of the invention with the same.

All drawings for letters patent must show the true position and proportion of the parts of the invention they purport to delineate; but they need not be accurate enough to be used as working drawings from which to construct specimens of these inventions.

40. A model of the invention must be furnished by the applicant in all cases admitting of such a representation, provided the Commissioner requires a model. Under the operation of the law of 1870, models are at present required by the Commissioner in very few cases which admit of representation in this manner.

41. Specimens of composition of matter and the ingredients are required by statute for such compositions in all cases whenever the Commissioner calls for them. In fact, he always does call for at least a specimen of the composition, put up in proper form to be preserved, unless that composition is in its nature perishable.

42. An application for a patent dates from its filing in the Patent Office, and not from the date of its execution by the applicant. When an application is divided by filing a new one for a part of the old subject, the new one will date from the date of the old one. In the absence of other evidence, the date of an application for a particular patent is taken to be identical with the date of the letters patent itself.[1]

On granting several patents to one inventor for different inventions in the same art, the dates of their application, instead of the dates of the inventions themselves, determine their relative merits. In order to apply this rule, the date, if the invention covered by the patent is sought to be anticipated, must be fixed.

[1] Walker, § 129.

No invention ought to date from any day wherein it had no existence outside the mind of the inventor no matter how complete may have been his mental conception of its character and mode of operation. Says Walker: "Mental conceptions are not useful inventions until they are so embodied that the world can use them after the death of the persons who conceived them. To allow inventions to take date from mental conceptions would strongly tempt inventors to commit perjury in order to appear to anticipate real anticipations of their patents." [1]

"Whether an oral description, given by an inventor to another, of a subsequently patented invention can give that invention a date earlier than that to which it would otherwise be entitled, depends upon the nature of the invention and the capacity of the hearer to understand it and remember it." [2]

43. After making an application it is the Commissioner's duty to cause an examination to be made of the applicant's invention; and, if it appears that he is justly entitled to a patent, it is the Commissioner's duty to issue it. This examination may be made by an assistant designated for that purpose, the Commissioner having the right to overrule his decision.

The examination may extend to the knowledge of the invention and to any other question of fact on which the validity of the patent depends. In examining any question of fact the patent office officials are not confined to technical evidence, but may make use of any books or publications they deem proper.

[1] § 70.
[2] Ibid.

Should an investigation require the taking of testimony by the Commissioner, this must be taken in the form of depositions on notice to the applicant to appear and cross-examine the persons who are to testify.

While an application is pending the Commissioner has no authority to furnish a copy of any paper pertaining to it, except to the applicant or his attorney or agent. No patent official has any authority to give to any person information about a pending application, save a very limited extent as prescribed by the rules of the Patent Office.

44. After rejecting an application for a patent it is the Commissioner's duty to notify the applicant, giving him the reasons for his action, together with such information as many be useful in judging of the propriety of amending his application, or altering his specification. If, after receiving such notice, the applicant persists in his request for a patent, with or without altering his specification, it becomes the Commissioner's duty to make a re-examination.

45. If the application is again rejected by the primary examiner the applicant may appeal to the Board of Examiners-in-Chief, and if unsuccessful before them, may appeal to the Commissioner. The appeal may be heard by him, or by his assistants. If heard by the latter there is no appeal to the former, and no decision can be reopened or set aside by any successor, except for fraud, clerical error apparent on the face of the record, or newly discovered evidence presented under circumstances that would justify a new trial in an action at law. If the Commissioner

or assistant commissioner refuse to grant him a patent the applicant may appeal to the Court of Appeals of the District of Columbia; and, if the Commissioner refuses to allow that appeal, he may be compelled to do so by a writ of mandamus, so called, granted by that court on the applicant's petition. All appeals must be heard on the case as submitted to the primary examiner. No appeal, therefore, should be taken until the application is in such a condition that the patent will issue if the decision of the primary examiner be reversed. If that decision is reversed by the Board of Examiners-in-Chief the primary examiner must pass the case for issue. If the Board affirms the primary examiner's decision the Commissioner will not reverse the Board on any question of fact, unless its decision was clearly against the weight of evidence. If the Commissioner affirms the decision of the Board he need assign but one reason for that opinion; the applicant cannot demand of him that he pass upon any other question. The Commissioner may, at any time before the issue of the patent, reverse his own or any other favourable patent office action thereon, except that of his predecessor, or of the preceding assistant commissioner.

46. Any party aggrieved by the Commissioner's decision in any interference case may appeal to the Court of Appeals of the District of Columbia.

When an appeal is taken to the Court of Appeals the applicant is required to give notice to the Commissioner, and to file, in the Patent Office within such

time as the Commissioner shall appoint, his specific reasons for appealing.

The Court of Appeals, therefore, is the final tribunal in all these cases. Often elaborate hearings are had before that body to determine the validity of applications.

47. The right to amend an application for a patent is one of great value. It is not expressly established by statute, though frequently exercised. The applicant may amend before or after the first rejection of his patent, and he may amend as often as the examiner presents any new reasons for rejection. Indeed, amendments not affecting the merits of the patent may be made after it has been allowed, and even after payment of the final fee, provided they are approved first by the examiner and then by the Commissioner.

48. By the statute only he or they who have invented a particular process or thing can lawfully receive a patent therefor, except in a case where the patentee is an assignee or legal representative of the true inventor or inventors. The patent must disclose the real inventor and must be founded on his right as the one. It follows that if one of two or more persons obtain a patent for a process or thing which was jointly invented by them all, the patent is not valid. And if several persons obtain a joint patent for what was invented solely by one of them, the patent is also void.[1]

[1] Walker, §§ 50, 51, pp. 64, 65.

§ 2. Copyright and Trade-mark

1. The right to copyright.
2. What may be copyrighted.
3. Length of copyright.
4. Meaning of books, etc.
5. Is given only to authors.
6. Words to indicate copyright.
7. Meaning of publication.
8. Who is an author.
9. Renewal of copyright.
10. What is an infringement.
11. Reproduction of a part.
12. Quotation.
13. Compilation.
14. Remedy for infringing.
15. Trade-mark defined.
16. What a trade-mark may be.
17. Legal test of a trade-mark.
18. A trade-mark is property.
19. Protection to aliens.
20. A trade-mark is the right of the manufacturer.
21. Novelty required.
22. Must be honestly used.
23. Duration of trade-mark.
24. Trade-mark may be assigned.
25. Infringement.
26. Must the deception be intentional.

1. Associated with patents is the law of copyright. The National Government secures to the writer or

author his ideas as well as his invention. Says Justice Yates in an old case: "Ideas are free, but, while the author confines them to his study, they are like birds in a cage which none but he can have a right to let fly. For, till he thinks proper to emancipate them, they are under his dominion." Every man has a right to his own sentiments. He has certainly a right to decide, if he will, to make them public, or to use them only in the sight of his friends. In that sense a manuscript is peculiar property, and no man can take it from him and use it himself without violating the great law of property. And, as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication. Whoever, therefore, deprives him of that priority is guilty of manifest wrong."

2. In 1909 the statutes relating to copyright were amended and consolidated, and all prior ones were repealed. Three amendments have since been made in 1912, '13, '14. By these statutes copyright has been extended to cover more things, especially the wonderful results of the phonograph and automatic musical machine.

The things that may be copyrighted by the new law are divided into two classes. Into the first class is put (a) books, including composite and cyclopedic works, directories, gazetters and other compilations; (b) periodicals including newspapers; (c) lectures, sermons, addresses prepared for oral delivery; (d) dramatic or dramatico-musical compositions; (e) musical composi-

tions; (f) maps. In the second class are (g) works of art, models, or designs for works of art; (h) reproductions of a work of art; (i) drawings or plastic works of a scientific or technical character; (j) photographs; (k) prints and pictorial illustrations; (l) motion-picture photoplays; (m), motion pictures other than photoplays.

3. The life of the copyright is twenty-eight years, and under the old law might be renewed for fourteen years. By the new law the life of a copyright may be renewed for twenty-eight years if notice be given a year in advance of the expiration of the first term.

4. The term books as used in the first subdivision of the section includes all literary works (not specified under b, c, d), whether reproduced in print, typewriting, photography, handwriting, electro or stereotyping, or any other mechanical process, and whether in the usual shape of a book, or of a pamphlet, leaflet, card or even a single sheet. By literary works, as used in the foregoing sentence, are meant not purely works of literature in its ordinary sense, but all works otherwise copyrightable, expressed or formulated in words, not specified in subdivisions b, c, d. Nor need the book be printed. Again, it includes the entire volume and every part published separately, including the illustrations, by whatever process they are produced.

5. A copyright can be given only to authors. But this word for copyright purposes includes composer, artist, photographer, compiler, draughtsman, sculptor,

dramatist, and practically means the creator of any tangible expression of thought addressed to the human mind through the eye and, possibly to the sense of touch, or to the ear.[1]

6. The things mentioned in the first class must bear the word "copyright," or the abbreviation "Copr," accompanied by the name of the copyright proprietor, "and if the work be a printed literary, musical or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the second class the notice may consist of the capital 'C' surrounded by a circle, accompanied by only the initials, monogram, mark or symbol of the copyright proprietor," provided that on some accessible portion of such copies, or the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear." It may also be added that for the seeker of copyright protection, the notifying word is "copyright," not "copyrighted," so often used in the past.

7. What is meant by publication? This would seem to be a simple question, but the law is full of difficulties, unseen on the surface. The delivery of a lecture to an audience is not a publication; nor is a book with a title-page containing the statement, "printed, not published," or "printed only for private circulation." In practice a book that is advertised is supposed to be published, for it is then offered to the public for a price. To give away a few copies is not a publication, and does not invalidate a copyright. To

[1] Weil on Am. Copyright Law, p. 44.

act or represent a play will not avoid a subsequent copyright.

The sixty-second section of the copyright law partly answers the question. In the case of a work of which copies are reproduced for sale or distribution the date of publication is the earliest date for placing on sale copies of the first authorized edition by the proprietor or by his authority. Says Weil:[1] "This definition sufficiently describes the publication of books, prints, motion picture films, casts and all of those literary and artistic products which are reproduced in copies, as a means of bringing them before the public.

"Publication on its face involves the conception of making public in contradistinction from keeping private. A 'limited' publication, which does not involve makng the work public, is accordingly a contradistinction of terms. . . . The 'public' may consist of one person. An unrestricted sale of a single copy has been held a publication sufficient to divest common law copyright. . . . Hence a publication is not measured by the size of the public to whom it is made."

8. Who is an author? Professor Parsons says: "If he uses only old materials in an old way, if he fills his books from other books without the addition of anything new from his own mind, he certainly is not an author. One may make a scrap-book by pasting on the blank leaves of a book interesting articles cut from newspapers, and such volumes might, if printed,

[1] On Copyright, §§ 304-307, p. 123.

have a certain attractiveness and value, but it would not be easy to regard the maker as an author, and yet a mere commonplace book, like Southey's, for example, consisting solely of extracts, might be entitled to copyright on the ground of the care and labour or skill which had made so valuable a collection." The plan or system of a book, the classification and arrangement of topics may be so unique or important as to render it worthy of the protection of a copyright. Letters may be copyrighted, but an immoral, blasphemous, infamous, or otherwise illegal work is not entitled to a copyright. The English cases go further than our own in denying copyrights to works of this character. An artist employed by the Government on an exploring expedition, knowing that all his tracings were to be its property, had no copyright in them.

9. In renewing a copyright the author or proprietor of any work that may be copyrighted, or his executors, administrators or assigns may, at the expiration of the term fixed by the existing law, be renewed by the author, if still living, or the widow, widower, or children, or if not living then by the author's executors, or, in the absence of a will, his next of kin. The proprietor and assignee therefore of the author of a book, musical composition or other copyrighted work is not entitled to a renewal of the original term of his copyright.[1]

In some cases, however, the proprietor as distinguished from the author of a work may obtain a

[1] White-Smith Music Pub. Co. v. Goff, 180 Fed. 256.

renewal. These are: (a) posthumous works; (b) periodicals, except as to contributions copyrighted separately; (c) encyclopedic or other composite works with the exception noted under b; (d) a corporation—except as assignee or licensee; (e) or by employers, whether corporate or not, for whom the work was made, for hire. In no other cases is a copyright proprietor entitled to a renewal term by mere virtue of his ownership of the original copyright. Except therefore in the cases specified in which the proprietor is entitled to a renewal copyright the persons who are entitled to a renewal in the order named are, the author, his widow or her widower, the author's children, or executor, or next of kin if there be no will.[1]

10. An infringement may next be considered. It is difficult to lay down a general rule on this subject. Plagiarism is one thing; piracy another. Professor Parsons says: "Every writer must be permitted to use sentiments, descriptions, definitions or expressions which, in their very nature, are common property, and therefore not subject to any exclusive right; and mere imitation is pardonable because, in a matter of copyright, as of patent, resemblance is not the question, but identity. And, on the other hand, every author is entitled to the fruits which the law permits him to reap from the fields which he has cultivated." [2]

11. An author's right is infringed only when other persons produce a satisfactory copy of the whole or

[1] Weil, § 952, p. 364.
[2] Vol. II., p. 330, Eighth Edition.

a material part of the book, or other thing covered by the copyright. A smaller porduction in a book of nine cartoons from *Punch,* with or without the descriptive writing, was held to be an appropriation of the substantial part of the proprietors' sheets of letter-press and an infringement of their copyright.

"The true test whether there is piracy or not is to ascertain whether there is a servile or evasive imitation of [the complainant's] work, or whether there is a bona fide original compilation made up from common materials and common sources, with resemblances which are merely accidental or result from the nature of the subject."[1]

12. Rarely is a work reprinted without change, and an honest quotation from a book is not an infringement. If a book infringes the copyright of another book in a distinct particular, the remedy will not extend beyond the injury. Neither the intention of the party charged with the infringement, nor his ignorance of infringing, affects the matter. A translation may be infringed like an original book.

13. A compilation is not an infringement when it contains so much of original thought on the part of the compiler as to make his book essentially a new production. The answer is similar concerning an abridgement of a copyright book. Mr. Curtis, in his work on copyright, concludes that any abridgement whatever must be an infringement. Parsons says this is going too far. "Has the later author only made use of thoughts, or facts which the earlier

[1] Blatchford, J., Daly v. Palmer, 6 Blatchf. 256.

author gave to the public in such wise as to produce by his own original efforts a new book of his own?" This is the test that must be applied to such cases.

14. The remedy for infringing a copyright is generally an injunction. To be effective it must be perpetual. Usually the petitioner prays for an immediate injunction. This may be granted temporarily or be refused. In no case is a permanent injunction granted until after a full hearing on the merits of the complaint.

15. Passing to the subject of trade-marks, this is full of extremely difficult questions concerning their nature and protection. A trade-mark may be defined as the name or device used by a seller of goods to indicate that they are made by him, and that he has an exclusive right to sell them. His object in securing a trade-mark is to acquire the profits arising from the sale of the goods thus bearing a peculiar mark.

16. A trade-mark may be any device or symbol adopted by the owner. The essential thing is, its use to designate the true origin and ownership of the article to which it is affixed. It need not indicate any particular person as the maker of the article. Numerals may be thus arbitrarily used in combination with other devices. Also, the name of a place—as Akron cement—or pictures, symbols, or simply a word or words. Thus the word, "Bethesda" applied to a spring, to indicate its origin and ownership, was held a valid trade-mark and entitled to protection.

The necessary name of a product, natural or manufactured, cannot be a trade-mark, even of goods man-

ufactured under a patent. The descriptive name by which they are known during the life of the letters patent becomes their popular name in the trade—the name by which they are necessarily known and distinguished. When therefore the protection of the patent has expired, the name is public and the manufacturer can claim no trade-mark in it.[1]

The trade-mark must be used to indicate not the quality, but the origin or ownership of the article to which it is attached. It may be any sign, mark, symbol, word or words which others have not an equal right to employ for the same purpose.[2]

17. The legal test of a trade-mark must always be, did the trade-mark itself ascribe the manufacture to him who used the mark. Perhaps the trade-mark would do this, perhaps this result might come from general knowledge through time. The safest course, so an eminent authority says, is to follow the custom which is now nearly, if not quite, universal—i. e., to connect with the mark a name or designation which should connect the thing bearing the mark with the name of him who uses it.

18. The exclusive right secured by a patent or copyright is regarded in law as property. As the same statute includes trade-marks, they also are property.

A foreigner has no common law right to a trade-mark in the United States as against a citizen who has adopted a similar mark in good faith before the alien has sold any goods in this country.

19. Aliens who "are entitled to the exclusive use of

[1] Hopkins on Trade-Marks, § 40 (2d Ed.).
[2] Earl, Com. of Appeals, 51 N. Y. 189.

any lawful trade-mark, or who intend to adopt and use any trade-mark for exclusive use within the United States," are protected quite as effectually as our own citizens. By a recent statute the right is somewhat restricted—i, e., to countries affording similar privileges to citizens of the United States.

20. A trade-mark is essentially the right of the manufacturer only. From authority and practice, therefore, a seller can possess this right only from the manufacturer. If a glove manufacturer, for example, in Paris, has acquired an extensive reputation, and arranges for a merchant in New York to sell his gloves, he may have the right to call himself the exclusive importer. But this action would not prevent any person who could get these goods in Europe from bringing them here and selling them as the gloves of the manufacturer. But he would have no right to assume that he had an arrangement with the manufacturer, and was, therefore, his exclusive agent or representative in this country.

Most of the trade-marks are held by manufacturers. Others there are who use them to identify their articles of commerce, while some persons apply geographical names as trade-marks to the natural products of the earth. "This may be done of course only by the owners of its sole place of production, as, if the product were accessible to others, there could be no exclusive right to the trade-mark except to identify the person who handled the product on its way to the consumer." Many mercantile houses who merely select merchandise, use trade-marks on their goods, which are valid

because the marks are equivalent to a certificate that the goods thus marked are genuine and possess a degree of excellence expressing the skill and judgment of the selectors. With this class of cases may be mentioned the union label affixed to goods manufactured by members of a labor union. In some of these cases their right to the protection of their label as a trade-mark has been denied, in other cases the right has been affirmed. In a cigar case affirming the right to affix such a label the court said: "It is no doubt true that the union label does not answer to the definition ordinarily given to a technical trade-mark, because it does not indicate with any degree of certainty by what particular person or firm the cigars to which it may be affixed were manufactured, or serve to distinguish the goods of one cigar manufacturer from the goods of another manufacturer, and because the complainant appears to have no vendible interest in the label, but merely a right to use it on cigars of his own make, so long and only so long as he remains a member of the union. In each of these respects the label lacks the characteristics of a trade-mark."[1]

21. Questions sometimes arise concerning the degree of novelty required for a valid trade-mark. If the name has been long and commonly used to designate certain articles, no one could now claim an exclusive right to this name by making it his trade-mark. Parsons says the requirement of absolute novelty in a name or mark has not been pushed, and will not be so far as the needed novelty of a patented invention.

[1] Thayer, J., Carson v. Ury, 39 Fed. 777.

The trade-mark recognized by the common law is generally the growth of a considerable period of use, rather than a sudden invention. It is often the result of accident rather than design; and when under the act of Congress it is sought to establish it by registration, neither originality, invention, discovery, science or art is in any way essential to the right conferred by that act.[1]

22. No man will be protected in the use of his trade-mark unless it be an honest mark and has been used honestly. Sometimes a man falsely inserts in his trademark the word "patent." This is a legal offense.[1]

23. A certificate of registration shall remain in force for twenty years except that in the case of trade-marks previously registered in a foreign country they shall cease to be in force on the day it ceases to be protected in such foreign country and shall in no case remain in force more than twenty years unless renewed.

24. Every registered trade-mark, and every mark for the registration of which application has been made, together with the application for registration of the same shall be assignable in connection with the good will of the business in which the mark is used. The assignment must be in writing duly acknowledged, and is void as against any subsequent purchaser for a valuable consideration without notice, unless it is recorded in the Patent Office within three months from the date of making the assignment.

[1] Miller, J., Trademark Cases, 100 U. S. 82, 94.

In the sale of a business the general rule is the trade-marks connected therewith pass without specific mention to the purchaser and in case of bankruptcy inure to the benefit of the creditors. To this rule must be excepted trade-marks that depend on secret processes or individual skill.

A joint and several ownership may be created by assignment.

A trade-mark may, in connection with the good will of the business, be transmitted by bequest. And several persons may by bequest, as on the dissolution of a partnership, become the rightful possessors to use it. With no agreement existing at the time of dissolving a partnership, each partner may go on and use the trade-mark of the firm. But if it is a common design for a joint adventure it can be used in no other way, and therefore when the enterprise is ended the trade-mark no longer exists.

25. The trade-mark may be infringed, it may be forged or imitated. The remedy in such cases is by injunction. But a court of equity will not restrain the use of a label on the ground of infringement unless the similitude is so great as to deceive purchasers who are not cautious. It is not necessary to show that anyone has been actually misled; and evidence of one sale of the imitation will justify an injunction. If the imitation be so close in its most salient and obvious features that the differences are only in subordinate and less noticeable characteristics, the law is violated. In one case the imitation consisted in the use of one word only. The remainder of the original trade-mark

was quite different from the imitation; nevertheless an injunction was granted.

26. Must the deception be intentional, and, therefore, fraudulent? One may make foods and affix to them a mark indicating a peculiar merit without intending to deceive anyone concerning their manufacture. If the deception be one in fact, though not in intention, the law will protect the rightful owner.

It is not necessary to constitute an infringement that every word of a trade-mark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article.[1]

[1] Brown, J., 79 U. S. 19, 33.

CHAPTER X

CONTRACTS

§ 1. Introduction

1. Definition.
2. Simple contracts and specialties.
3. Executory and executed contracts.
4. Express and implied contracts.

This is a very extensive subject; indeed, a large portion of the entire legal field might be covered by a complete statement of the law on this subject.

1. Let us begin with a definition. Chief Justice Marshall's has often been quoted: "A contract is an agreement to do, or not to do, a particular thing." [1]

2. The most general division of contracts is into simple contracts and specialties. A specialty is in writing, to which a seal is added, after the name of each contracting party. A simple contract includes all kinds that are not thus sealed. They are often called parol contracts. In some cases the law requires the sealing of contracts, but more frequently contracts are either verbal or written without the addition of a seal. Formerly, when people could not write, much more attention was paid to the use of a

[1] For various forms of agreements see Vol. VI, Appendix, No. 28.

seal than is paid at the present time. Nevertheless, there are some peculiarities relating to sealed contracts, especially in the way of evidence. For example, a cause or consideration for making a sealed contract need not be proved, because the law assumes that a consideration was given. A person who wishes to enforce or compel another to perform a verbal or unsealed contract must show that there was a consideration for making it.

3. Another division is into executed and executory contracts. The terms clearly express their meaning. An executed contract is finished, completed, like a paid note; an executory contract is still incomplete, like a note that is still running.

4. Another division is into express and implied contracts. An express contract is actually made in words or in writing; an implied contract is made by the law and is founded on justice. Thus, if A asks B to go and work in his field, and B goes and labours, though not a word is said about compensation, the law implies that B must be reasonably rewarded. Implied contracts are created under a great variety of conditions, as we shall shortly learn.

§ 2. Parties

1. Who is a minor or infant.
2. Classification of minors' contracts.
3. Contracts of a minor for necessaries.
4. What are voidable contracts.
5. Effect of a promise to pay afterward.

6. If his contract is not avoided it remains in force.
7. Fraudulent contracts made by a minor.
8. He cannot bind himself when he has a parent or guardian.
9. He may, with his guardian's consent.
10. If he avoids his contract he can take no benefit from it.
11. Emancipation.
12. Contracts of married women.
13. Contracts of aliens.
14. Contracts of drunken persons.
15. Contracts of insane persons.

1. To every contract there are two or more parties, but not every person can be a legal party. Persons under twenty-one years of age cannot make them. In law they are infants or minors; and infancy disables them from making contracts, except for things needful to sustain their lives and health—in other words, for necessaries. In most states, infancy ends at the age of twenty-one; in some of them women are regarded as of full age at eighteen. A person becomes of age at the beginning of the day before his twenty-first birthday. The reason, though not a very sound one, is that the law, except in cases imperatively required by justice, does not recognise parts of a day. A person, therefore, born on the ninth of May in the year 1900, will become of age at the beginning of the eighth of May, 1921. If he were born at the beginning of the ninth at the end of the eighth, twenty-one years afterward, he would have lived the full period of

infancy. If he were born at the end of the ninth, as he became twenty-one at the beginning of the eighth, two days, in truth, would be lacking to complete the full infantile period.

By statute in some states females become of age at eighteen, in other states on marriage, in a few states both sexes attain their majority on marriage.

2. The contracts of minors may be divided into two classes: contracts for necessaries, and for other things. The rule making the first class binding on them is established for their benefit and protection. The obligation, however, is rather implied by law than arising by express contract. Consequently, only a reasonable price can be recovered for anything sold to a minor, whatever may have been the price fixed by the parties.

3. It is not always easy to distinguish between the things that are strictly necessary and other things. First of all, a thing may be regarded as necessary by one that would not be by another, depending on varying conditions of life. Usually, there has not been much difficulty in applying this rule of law. Necessaries include not only the things needful to support life, but such as are suitable to an infant's degree and estate; and the question, if disputed in a court of law, is a proper one for a jury to decide whether they were so or not, and whether they were furnished at reasonable prices. Cases are constantly arising in which minors seek to avoid their contracts, but, having had the benefit of them, are required by the law to fulfil them. Sometimes, when a minor's

extravagance is clearly proved, and sellers must have known that his purchases were not needed, they have failed to collect their bills. One of these cases was decided long ago by Chief Justice Gibson.[1] The bill exceeded a thousand dollars, and included twelve coats, seventeen vests, and twenty-three pairs of trousers, within fifteen months and twenty-one days, besides five canes, fur caps, chip hats and other things. The judge remarked that such a bill made him shudder, and yet the jury decided that the merchant could recover almost the whole of the amount. The judge said there was no reason for regarding such things as necessaries, and that it was the merchant's duty to know that the supplies were exceptionable in quantity and kind, and that they were not actually needed. When, for the purpose of relieving the minor, he assumed the business of guardian, he was bound to execute the duty as a prudent guardian would do, and, consequently, to make himself acquainted with the ward's necessities and circumstances.

4. Contracts for other things than necessaries are not absolutely void, but voidable. While they remain executory on the minor's part, he can disavow them at any time; after they have been fully executed he can disaffirm or ratify them as soon as he has attained his majority, or within a reasonable time afterward.

5. To ratify is not merely to acknowledge the contract. In some of the states a statute requires a new promise in writing and signed by the promisor, otherwise he is not liable.

[1] Johnson v. Lines, 6 Watts & Serg., 80.

The law does not require the use of any particular words or phrases for this purpose, but the description of the debt and the promise must be clear enough for the creditor to understand the promisor. It must also be made voluntarily and for the purpose of assuming a liability from which the adult knows that the law has relieved him. If the promise be conditional the condition must be proved before the promise can be enforced.

6. A minor's contract which is not avoided remains in force. What is the effect of remaining silent? As a general rule, mere silence is not a confirmation, because a contract may be disaffirmed after the creditors' attempting to enforce it. But a minor may do many things from which a confirmation may be established. For example, should he buy property and, after reaching his majority, sell it, this would be a confirmation of his purchase. Generally, continued possession and use of a thing is evidence of confirmation. If he should buy a horse and give his note for the amount, he might, after attaining his majority, return the horse and refuse to pay the note. To retain the horse would be regarded as a confirmation of the note. The evidence of confirmation would be still stronger after a refusal to deliver the thing that could be redelivered.

A minor who borrows money for the purpose of spending it in purchasing necessaries, and gives his note for the amount, perhaps can avoid that, but he would be still liable for the debt. And he is also liable for money paid at his request for necessaries.

The strong tendency of the modern law is to regard all acts and contracts, and all transactions of minors as voidable only. The courts are now constantly declaring that these acts are not void, but voidable only, unless they are manifestly prejudicial.

7. To contracts of a fraudulent nature made by a minor a different rule applies. Suppose he is nearly twenty-one and by misrepresentation concerning his age obtains credit for a bill of goods. Can he afterward escape payment on the ground that he made no contract for them because he was not legally capable of contracting? This question has been presented to legal tribunals more than once for answer. While the contract cannot be enforced, because none exists which the law will recognise, the minor is liable in an action of deceit, and the damage he must pay is the value of the goods purchased. Thus, in another way, justice is done, and the law, declaring a minor's inability to make a contract, regarded.

8. A minor who has a guardian or parent cannot bind himself even for necessaries. Unable from want of sufficient discretion to judge what is best for himself, or to dispose of his property, his guardian or parent can act for him and protect him. This safeguard, though, would be of little worth could a third person deal directly with a minor and bind him by his contract. He would be left exposed to the consequences of his own foolishness, and to the craft of others.

Nor is a parent under any obligation to pay the debts of his child. And this rule extends even to those contracted for necessary food, clothing, and

shelter. Shall a son be left to starve? No; the son must apply to the authorities, who will compel his father, if possessing the ability, to support him.

9. A minor may bind himself by a contract for necessaries, and also for things used in carrying on the business in which he is engaged, with the consent of his parent or guardian. On one occasion a guardian put his ward in possession of some land to cultivate, and furnished him with a yoke of oxen for that purpose. "Did not this," so the court inquired, "imply an authority from the guardian to the minor to buy a plow and harrow, and to hire additional labour to make hay and gather his harvest, which he could not do alone?" And the question was answered in the affirmative.

10. A minor who avoids a contract can retain no benefit from it. Thus, if he contracts to sell a thing and refuses to deliver it, he cannot demand the price; or, if he contracted to buy a thing and refuses to pay the price, he cannot demand the thing purchased.

11. A parent may endow his minor son with the right to make a contract to serve another and to retain the reward he is to receive. This is called emancipation. Not infrequently the father claims the reward on the ground that he has not emancipated his son. This inquiry, when conducted by a judicial tribunal, is chiefly one of fact. An eminent jurist long ago declared: "We go so far as to say that, when a minor son makes a contract for his services on his

own account, and the father knows of it and makes no objection, there is an implied assent that the son shall have his earnings."[1]

Again, should a minor make a contract for his service, with his father's consent, he could disaffirm it at any time and claim, nevertheless, a reasonable sum for what he had done. Suppose he had agreed to work for another for a year, and, after working six months, should learn that he could earn more from another employer. He could rescind his contract and recover the worth of his labour for the period he served.

Lastly, his emancipation does not have the effect of transforming his voidable contracts into binding obligations. He can still take advantage of his infancy. The effect of his emancipation, therefore, is simply to release him from his parents' control with respect to making a contract for his services and retaining his earnings.

12. Another class of persons who are not perfectly free to contract are married women. By the common law a married woman had very little authority to make contracts. The law gave all the personal property she had to her husband, rendered him liable for all her debts, and shielded her from any engagements she might make. By statute, in all of the states, her authority to make contracts has been greatly enlarged. In general these statutes give her authority to sign notes and other obligations, and to engage in business,

[1] Parker, Ch. J., Whiting v. Earle 3 Pick, 201. Approved in Atkins v. Sherlino, 58 Vt., 248.

buy and sell real estate and other property, almost as freely as if she was unmarried. Some restrictions remain in selling real estate, and becoming responsible for the debts of her husband and others. As the statutes of each state differ in some way, and are limited in their operation to the state enacting them, they are not given here.

13. Other persons who are not always free to make contracts are aliens. By the common law they had no authority to own or hold real estate, nor could they give a good title to it by contract, or transmit a good title to their heirs. But their disabilities have been removed in all the states by stitute, so that they can own property and make contracts like other persons.

14. Two other classes may be mentioned who are incapable, to a considerable degree, of making contracts—drunken people and persons who are insane. By the old rule of law a man who made a contract when in a state of intoxication was liable; his intoxication was no excuse or defense. But this principle has long since given way to one more in harmony with justice. A person who is so destitute of reason as not to know the consequences of his contract, even though this state of mind was produced by intoxication, is not obliged to fulfil or execute it.

To this rule a negotiable note taken by a third person without any knowledge of the maker's drunkenness is an exception, which is made for the protection of the paper. In all other cases the above rule now applies.

15. A different rule applies to the contracts of an insane man. Like a person who has not attained his majority, he is liable on a contract for the necessaries of life that he has received, and he would also be for merchandise innocently furnished on his order by a person who did not know of his infirmity. Insanity is a permanent state or condition of the mind that disables one from taking care of himself; drunkenness is a temporary disability that is voluntarily produced. Insanity is a misfortune; drunkenness is a vice. No man voluntarily does an act necessarily producing madness in order that he may become insane, but men drink that they may become drunk; and, when they thus deprive themselves of the use of their reason and voluntarily expose themselves to fraud, the law wisely refuses to treat them with the same tenderness as those unfortunate beings who are deprived of their understanding.

The contracts of an insane person may be divided into two classes, those that are void; others that are voidable, or that may be declared void if the insane person or his representatives wishes to do so. In the former class are a power of attorney attempting to authorise another to act for him to sell land, or a contract made by him after the appointment of a guardian or conservator over him. Nevertheless insane persons may make contracts during lucid intervals, or ratify contracts made at other times.

As a general rule the contract of an insane man, if fair and beneficial to him, and made in good faith without knowledge of his infirmity, cannot be avoided

unless the other party is put in his previous condition. Unless the insane person does not offer to do this, or cannot place the other party in his former position, the contract is binding.